No. 18-1062

In The
Supreme Court of the United States

♦

LOVE TERMINAL PARTNERS, L.P. AND VIRGINIA AEROSPACE, LLC,
Petitioners,

v.

UNITED STATES,
Respondent.

♦

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

♦

BRIEF *AMICI CURIAE* OF THE NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL ASSOCIATION OF HOME BUILDERS, REAL ESTATE ROUNDTABLE, CATO INSTITUTE, SOUTHEASTERN LEGAL FOUNDATION, AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

♦

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061
luke.wake@nfib.org

Thomas J. Ward
Devala Janardan
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200
tward@nahb.org
djanardan@nahb.org

Ilya Shapiro
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Kimberley S. Herman
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
(678) 269-4966
khermann@southeasternlegal.org

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amici Curiae

Dated: March 15, 2019

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036

Questions Presented

1. In assessing whether the government has effected a compensable taking, may courts treat real property as worthless simply because the owner was not generating positive cashflow from the property at the time of the taking?

2. In determining whether the taking of property had any economic impact on its owner, may courts ignore reasonable, investment-backed expectations that a regulatory environment is likely to change and, in fact, has been changed by the very law that effects the taking?

Table of Contents

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici* 1

Summary of Argument 4

THIS COURT SHOULD PROVIDE MUCH NEEDED GUIDANCE FOR ASSESSING ECONOMIC IMPACT IN REGULATORY TAKINGS CASES.. 6

A. The Federal Circuit's Approach Would Defeat Any Takings Claim for a Property That Is Not Yet Turning a Profit 6

B. Review Is Appropriate to Resolve Conflict Among the Lower Courts as to Whether Prospective Economic Value Should be Considered in Assessing the Merits of a Regulatory Takings Claim............................ 17

Conclusion 20

Table of Authorities

Page(s)

Cases

Arkansas Game & Fish Comm'n v. United States,
568 U.S. 23 (2012) 7

Armstrong v. United States,
364 U.S. 40 (1960) 10, 15

Beyer v. City of Marathon,
197 So. 3d 563 (Fla. Dist. Ct. App. 2013) 19

BPM Property Dev. v. Melvin,
198 Cal. App. 3d 526 (1988) 14

Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n,
2018 WL 3149489 (D. Haw. June 27, 2018) 19

Comm'r of Transp. v. Towpath Assocs.,
255 Conn. 529, 767 A.2d 1169 (2001) 11

Del Monte Dunes v. City of Monterey,
95 F.3d 1422 (9th Cir. 1996) 19

E. Enterprises v. Apfel,
524 U.S. 498 (1998) 6

Ganson v. City of Marathon,
222 So.3d 17 (Fla. Dist. Ct. App. 2016) 8

In re Clara Welch Thanksgiving Home,
123 A.D.3d 1313
(N.Y. App. Div. 2014) 12

In re Marriage of Joyce E. Schelmeske,
390 N.W.2d 309 (Minn. Ct. App. 1986) 12

Jacobellis v. Ohio,
378 U.S. 184 (1964) 7

Klungness v. Cty. of Dakota,
1989 WL 8389 (Minn. Tax 1989) 12

Lake Props. v. Cty. of Sherburne,
1987 WL 19117 (Minn. Tax 1987) 14

Leone v. Cty. of Maui,
404 P.3d 1257 (Haw. 2017),
cert. denied _ S. Ct. _ (2019).......................... 19, 20

Lingle v. Chevron U.S.A.,
544 U.S. 528 (2005) 14

Lost Tree Vill. Corp. v. United States,
787 F.3d 1111 (Fed. Cir. 2015).................. 9, 11, 18

Love Terminal Partners, L.P. v. United States,
889 F.3d 1331 (2018) .... *passim*

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) .... *passim*

Monongahela Nav. Co. v. United States,
148 U.S. 312, 328 (1893) 11

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

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 7, 15

Robinson v. Baton Rouge,
2016 WL 6211276 (M.D. La. Oct. 22, 2016) 18

United States v. 819.98 Acres of Land, More or Less, Located in Wasatch and Summit Ctys.,
78 F.3d 1468 (10th Cir. 1996) 12

United States v. L.E. Cooke Co.,
991 F.2d 336 (6th Cir. 1993) 12

United States v. Miller,
317 U.S. 369 (1943) 11

Van Zelst v. Comm'r,
70 T.C.M. (CCH) 435 (T.C. 1995), *aff'd*,
100 F.3d 1259 (7th Cir. 1996), ... 13

Vieth v. Jubelirer,
541 U.S. 267 (2004) 17

Statute

28 U.S.C. § 1491(a)(1) 6

Rule

Sup. Ct. R. 37 1

Other Authorities

Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*,
22 Fed. Circuit B.J. 677 (2013) 8

Alicia Robb, Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms, Commissioned by the U.S. Small Business Administration (Apr. 2013) 16

Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847 (2017) 7, 19

Daisy Linda Kone, *Land Development*
(10th ed. 2006) 10

Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*,
88 Cornell L. Rev. 1549 (2003)........................... 15

Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679 (2005) 17

H.G. Parsa *et al.*, *Why Restaurants Fail*, Cornell Hotel and Restaurant Administration Quarterly, Vol. 46, No. 3 (2005) 13

James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998) 3

John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171 (2005)........ 8, 17

Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council: *A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1 (2017).. 7

NFIB Research Foundation, Small Business, Credit Access, and a Lingering Recession, (Jan. 2012) 16

R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731 (2011) 9, 17

Small Business Problems & Priorities, 2016 NFIB Research Foundation (Aug. 2016) ... 13

Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601 (2014)............................ 9

Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988) 17

Interest of *Amici*[1]

The **National Federation of Independent Business Small Business Legal Center (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. The National Federation of Independent Business (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.

The **National Association of Home Builders (NAHB)** is a Washington D.C.-based trade

[1] In accordance with Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission. Both the Petitioners and Respondent have consented to this brief and received timely notice of *amici's* intent to file.

association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The **Real Estate Roundtable** brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate industry trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing, and coordinating policy positions, The Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, Roundtable members' portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than $2 trillion; over 1.5 million apartment units; and in excess of 2.5 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

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 helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual Cato Supreme Court Review.

Southeastern Legal Foundation (SLF) is a national nonprofit, public interest firm and policy center that advocates individual liberties, limited government, and free enterprise. For 42 years, SLF has represented property owners challenging constitutional takings in state and federal court.

Owners' Counsel of America (OCA) is a national, invitation-only network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. See JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).

OCA is a non-profit organization, organized under I.R.C. § 501(c)(6) and sustained solely by its members. Only one member lawyer is admitted from each state. OCA brings unique experience to this task. Its member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amici* in many

of the takings cases this Court has considered in the past forty years. OCA members have also authored treatises, books, and scholarly articles on eminent domain, inverse condemnation, and regulatory takings, including authoring and editing chapters in the seminal treatise NICHOLS ON EMINENT DOMAIN. OCA believes that its members' long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

Amici have an interest in this case because they share a commitment to defending constitutional protections for private property rights. *Amici* have a strong interest in encouraging this Court to reassess its regulatory takings doctrine to ensure more predictable and more equitable outcomes.

Summary of Argument

Regulation effects a *per se* taking if it goes so far as to deny all economically beneficial uses or to render private property valueless. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Otherwise, partial takings claims, seeking compensation for restrictions limiting permissible uses of private property, are assessed under the three-factor balancing test established in *Penn Central Transportation Co. v. City of New York*, which requires an *ad hoc* analysis of: (1) the economic impact of the contested restriction; (2) the owner's reasonable investment-backed expectations, and; (3) the character of the government's conduct. 438 U.S. 104 (1978). But the Federal Circuit has now pronounced a categorical rule—one that arbitrarily

insulates government from takings liability no matter how strongly the *Penn Central* factors might otherwise militate in favor of a takings claimant. *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1344 (Fed. Cir. 2018). What is more, in contravention of *Lucas*, the Federal Circuit's newly minted rule would deny takings liability even where the restriction goes so far as to deny all economically beneficial uses or to destroy all prospective value in the property.

The Federal Circuit holds that a takings claim must ***categorically fail*** (whether advanced under *Lucas* or *Penn Central*) for any property that is not yet producing positive cash flow—even where the owner has invested heavily in the property with reasonable investment-backed expectations of future profits. *Id.* at 1344. This ignores economic realities. For one, Judge Dyk's opinion overlooks market forces that lead entrepreneurs to invest in underperforming properties with reasonable expectations of future profits after development, redevelopment, or other changes. More fundamentally, it ignores the practical reality that new ventures might take significant time to prove profitable or offer a return on investment. The Federal Circuit's approach to regulatory takings doctrine allows the government to abrogate common law property rights with impunity even where prospective restrictions take away the basis for investment in the first place, including even the right to continue in an established (non-noxious) use. Accordingly, the Court should grant *certiorari* to repudiate the Federal Circuit's rule, and to provide more coherent and predictable rules in regulatory takings cases.

Moreover, this case provides an ideal opportunity to resolve conflict among the lower courts over whether prospective economic value should be considered relevant in the takings analysis. On the one hand, the Federal Circuit pronounced that prospective economic value is irrelevant and that courts should ignore even objective and non-speculative evidence that a property will prove valuable over time. *Id.* at 1344. That is concerning given that this stands as binding precedent for virtually all cases against the federal government. *E. Enterprises v. Apfel*, 524 U.S. 498, 520, 118 S. Ct. 2131, 2144, 141 L. Ed. 2d 451 (1998) (citing 28 U.S.C. § 1491(a)(1)). Yet, the question is all the more important because other courts have concluded (just the opposite) that *prospective economic value is relevant* in the takings analysis. In these jurisdictions, state and local authorities may defeat a total takings claim, under *Lucas*, simply by asserting that a property *might* regain value over time because current prohibitions on development *might* be lifted in the future. As such, this Court should grant *certiorari* to clarify whether or when prospective economic value is relevant under either *Lucas* or *Penn Central*.

THIS COURT SHOULD PROVIDE MUCH NEEDED GUIDANCE FOR ASSESSING ECONOMIC IMPACT IN REGULATORY TAKINGS CASES

A. The Federal Circuit's Approach Would Defeat Any Takings Claim for a Property That Is Not Yet Turning a Profit

Regulatory takings doctrine has always required an assessment of the economic impact of the assailed

regulatory regime, on the view that a restriction is more likely to amount to a taking where the economic impact is greater. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (positing that the "extent of the diminution" was a significant consideration in the analysis). Yet this Court has given little guidance as to how to approach this analysis. In *Pennsylvania Coal*, Justice Holmes said that a taking occurs where regulation goes "too far" in abrogating common law rights. *Id*. at 415. But, that "I know it when I see it" standard provides little practical guidance. *Lucas*, 505 U.S. 1003, 1015 ("In 70–odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag [e] in ... essentially ad hoc, factual inquiries.') (quoting *Penn Central*, 438 U.S. at 124).[2]

The one bright line rule is that a restriction has sufficient economic impact if it is so draconian as to deny "all economically beneficial or productive use of land." 505 U.S. at 1015.[3] But most regulatory taking claims fall outside this rule.[4] Instead, courts assess

[2] *See* Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council: *A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 6 (2017) (analogizing to Justice Stewart's nebulous, and quintessentially subjective, test in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

[3] The only other bright line rule is that a physical taking occurs with a permanent physical occupation of private property—regardless of economic impact. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31-32 (2012).

[4] One study of 1,700 state and federal opinions found "only 27 cases in 25 years in which courts found a categorical taking under *Lucas*." Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1848-49 (2017).

most regulatory restrictions under *Penn Central*, where the economic impact of the restriction is but one of three factors in an amorphous balancing test. Yet forty years after *Penn Central*, this Court has offered little guidance on how judges should approach the *Penn Central* factors, and or whether any single factor is dispositive. *See Ganson v. City of Marathon*, 222 So.3d 17, 20 (Fla. Dist. Ct. App. 2016) (Shepherd, J., dissenting) ("Regrettably, regulatory takings jurisprudence is cryptic and convoluted."); *see also* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 208 (2005).

In this void the Federal Circuit pronounced a rule that the economic impact prong is paramount, at least where the owner has failed to prove a significant depreciation in value—even where there may be evidence that the restriction has scuttled strong investment-backed expectations of future profits. *Love Terminal Partners, L.P.*, 889 F.3d at 1344. That in itself presents a significant question of importance in so far as one accepts the Federal Circuit's conclusion that there was no economic impact here.[5] But more fundamentally, this Court should grant *certiorari* to decide whether the Federal Circuit erred in focusing its economic impact analysis solely on the fact that the subject property had yet to turn a profit.

"The most straightforward application of the economic impact prong as it was originally conceived would cut in favor of finding labiality when regulation

---

[5] Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 680 (2013) (empirical study found that most courts do not discuss all three *Penn Central* factors, but that those that do are more likely to engage in a true balancing test).

substantially impairs an income property's rate of return." R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 738 (2011); *see also* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 617-18 (2014) (observing that "it is unclear what burdens can be considered under the economic impact factor[,]" but that "Justice Brennan … focused on whether Penn Central was allowed a 'reasonable return' on its investment."). Under this view, "[a]ny significant depreciation in value should . . .weigh in favor of liability, and an impact approaching total deprivation of economically viable use could reasonably be assumed to swamp any countervailing considerations under *Penn Central's* remaining two prongs." 38 Ecology L.Q. at 738-39. But here the Federal Circuit's economic analysis considered only the property's "historical financial performance[,]" without considering whether the assailed restriction impaired (or destroyed) the possibility of a future return on investment. *Love Terminal Partners, L.P.*, 889 F.3d at 1344. This approach denies takings liability for restrictions imposed on a property that is not yet profitable, even where those restrictions deny the possibility of future profits that would have made the property attractive to a prospective buyer before the enactment. *See Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1119 (Fed. Cir. 2015) ("[G]overnment cannot rely on the regulatory taking at issue to reduce the fair market value of an affected parcel.").

The Federal Circuit's decision stressed that "at no point . . . did revenue exceed plaintiffs' carrying costs[,]" on the view that no economically beneficial

use existed before enactment of the Wright Amendment Reform Act in 2006. *Love Terminal Partners, L.P.*, 889 F.3d at 1344. By that standard virtually all start-up companies and development projects would be vulnerable because it often takes years to begin turning a profit on a new venture.[6] But it is improper to ignore the economic realities driving business decisions to invest in a property that will prove profitable in the future. *See Penn Central*, 438 U.S. at 123–25 (emphasizing an approach that looks to the reasonable expectations of the claimant, and with a pragmatic assessment of the "character" of the restriction); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (requiring consideration of the practical impact of the restriction in pronouncing that "the Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[.]").

Entrepreneurs and business investors typically plan on recouping an investment over an extended time period. Homebuilders, in particular, bear significant upfront financial burdens. Before turning

---

[6] The Federal Circuit's approach would also tank claims under *Penn Central* for commercial properties where the owner is only beginning to see a return on investment with modest incoming revenues—even where the assailed restriction has seriously upset reasonable investment-backed expectations by dramatically limiting the possibility of prospective profits. This is because the Federal Circuit ruled that the economic analysis should completely discount prospective value and should focus exclusively on past historical performance, which may be meager as compared to the expected return on investment overtime. This necessarily skews the analysis in a manner that minimizes (or outright ignores) the real-world economic impact.

a profit, builders retain professional services from market research and financial consultants, and project planners (such as land planners, architects, landscape architects, land use attorneys, engineers, and interior designers). Daisy Linda Kone, Land Development 11-16 (10th ed. 2006). They bear those costs on top of the land acquisition costs, and the actual costs of construction. But builders proceed—expecting to recoup those costs, and eventually to turn a profit—after great due diligence, considering market trends, economic conditions, regulatory factors, and so forth.

The Federal Circuit departs from established precedent in rejecting the rule that the economic analysis should focus on the real-world value that the market would have seen in the subject property before the imposed restriction—including all objectively reasonable considerations that a buyer would likely consider. *Lost Tree Vill. Corp.*, 787 F.3d at 1118 (emphasizing that "in the real world, real estate investors do not commit capital . . . to undevelopable property."); *United States v. Miller*, 317 U.S. 369, 375 (1943) ("market value of the property is to be fixed with due consideration of all its available uses" at the time of the taking). The opinion ignores market reality that recognizes economic value in an underperforming property based on reasonable forecasts for future profits. *See Monongahela Nav. Co. v. United States*, 148 U.S. 312, 328 (1893) (stating that "[t]he value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."); *Comm'r of Transp. v. Towpath Assocs.*, 255 Conn. 529, 540, 767 A.2d 1169, 1177 (2001) (market value should be based on the highest and best use— "the use which will most likely

produce the highest market value, greatest financial return, or the most profit."). Additionally, the present economic value is often based on objectively reasonable assumptions of a property's potential for generating future profits. *See*, *e.g.*, *United States v. 819.98 Acres of Land, More or Less, Located in Wasatch and Summit Ctys.*, 78 F.3d 1468, 1469–70 (10th Cir. 1996) (upholding valuation of condemned land based on expert testimony relating to comparable sales and discounted cash flow); *United States v. L.E. Cooke Co.*, 991 F.2d 336, 338–39 (6th Cir. 1993) (same).

Consider an entrepreneur who acquires undeveloped land for a contemplated mixed-use development. Although the property may not be generating significant income for the current owner, the buyer may nonetheless pay a premium to acquire the land if the market forecasts greater value given impending development or expiration of a standing mortarium on new construction.

Regardless, it is wrong to say that negative cash-flow equates to zero value. *See In re: Clara Welch Thanksgiving Home*, 123 A.D.3d 1313 (N.Y., App. Div. 2014) (approving of a nearly 4-million-dollar valuation, based on the comparable sales approach, for a property that produced negative cash flow); *In re Marriage of Joyce E. Schelmeske*, 390 N.W.2d 309, 311 (Mn. Ct. App. 1986) ("Appellant lists a negative cash flow with regard to the four apartment buildings[,] [but] [t]hree of the apartment buildings have a fair market value of $170,000, [and] the other has a fair market value of $150,000…"); *Klungness v. Cty. of Dakota*, 1989 WL 8389, *1 (Minn. Tax 1989) (recognizing that "the amount of the principal and

interest has little bearing upon the value of the property."). This is because current fair market value for any property necessarily reflects market demand for income generating assets. And even a property that is not currently profitable may be worth investment if there are reasons to believe that market conditions may change. *Cf. Van Zelst v. Comm'r*, 70 T.C.M. (CCH) 435, *11 (T.C. 1995), aff'd, 100 F.3d 1259 (7th Cir. 1996) (concluding that a property does not have a net zero value if an investor might "ascribe some value" based on an anticipated change in future conditions).

Negative cash-flow is commonly an accepted cost in a new venture.[7] For example, the typical restaurant bears a 30 percent chance of closing within the first year, but conditions become more stable with time. *See* H.G. Parsa *et. al.*, *Why Restaurants Fail*, Cornell Hotel and Restaurant Administration Quarterly, Vol. 46, No. 3, 305-06 (2005).[8] For that matter, few companies see reliably positive cash flow until they develop a solid customer base.[9] And it often takes time even for an established business to see profits when expanding to a new location.

---

[7] *Cf.* Small Business Problems & Priorities, 2016 NFIB Research Foundation, 76-77 (Aug. 2016) (finding that cash flow and low profit concerns rank highest for businesses five years or younger).

[8] https://daniels.du.edu/assets/research-hg-parsa-part-1-2015.pdf (last visited Mar. 12, 2019).

[9] "Small businesses open and close frequently, but as they mature they generally become more stable and profitable and therefore a better risk for lending purposes. Survival is substantially more precarious early in a businesses' life than after it has been in operation for a few years." Small Business Problems & Priorities at 75.

In any event, there is no basis for saying that a business is ***categorically barred*** from invoking the Takings Clause simply because the owner has yet to see a profit. Such a rule would contravene the principle that any legitimate takings test must focus on the burden imposed by the regulation. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 542 (2005) (emphasizing a focus on "the magnitude or character of the burden a particular regulation imposes upon private property rights or how any regulatory burden is distributed among property owners."). The Federal Circuit's rule would arbitrarily deny takings liability for an owner who has yet to turn profit, even though the restriction might impose the very same impact on an identically situated owner who has turned a modest profit. In both cases, the restriction would prospectively deny the same economically beneficial uses. Afterall, the market value of a gas station is likely indistinguishable from the final month that owner is servicing a debt on that property and the first month that the owner finally begins to see a profit.[10]

Indeed, the only difference between the takings claimant who is still operating at a net loss and the claimant who has recouped upfront investment costs may be that the former has yet fully to realize a reasonably anticipated return on investment. But the

[10] "One property may be purchased for cash and have no debt service, and an identical property may be purchased for little or no down payment and with substantial interest and principal payments. These differences should not be the basis for determining market value." *Lake Properties v. Cnty. of Sherburne*, 1987 WL 19117, * 1 (Minn. Tax 1987). *See, e.g.*, *BPM Property Development v. Melvin*, 198 Cal.App.3d 526 (1988) (separate properties had "virtually identical" values, notwithstanding "lack of incoming cash...").

Federal Circuit's rule would leave that owner with no potential recourse, while at least entertaining a takings claim from the owner who recouped investment costs. Not only is this outcome highly inequitable, but it would subvert regulatory takings doctrine if the proper economic analysis is supposed focus on whether there has been opportunity to attain a full return on investment.[11]

But whatever the proper formulation, it is emphatically wrong to say that there is no economic impact in a case in which the claimant presents reliable evidence that that the property was devalued because of a restriction that denies continued use of an economically beneficial property for which there were reasonable expectations of future profits. *See Pennsylvania Coal*, 260 U.S. at 414-16 (focusing on the fact that the enactment would "abolish" a "very valuable estate" and emphasizing that "the question at bottom is upon whom the loss of the changes desired should fall. . ."); *Armstrong*, 364 U.S. at 49. If an entrepreneur invests his life savings, or takes out a second mortgage on his home to acquire a property for which he intends to develop and for which the market anticipates future profits, there is unquestionably a major economic impact (and likewise frustration of reasonable investment-backed expectations) if the town council thereafter votes to rezone the property to permit only agricultural

---

[11] The problem remains that no one really knows how to approach the economic analysis because, as currently formulated, *Penn Central* is "admittedly standardless." Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1557 (2003).

uses.[12] Likewise, there is an obvious adverse economic impact if a company invests thousands of dollars to build a new facility only to learn that the government will now prohibit any use of that new construction (or if the government orders removal, as in this dispute).[13] In either case the owner may be operating at a net loss for the property, but is banking on being able to use the property for years to come, or to sell it at a profit. If the government upsets those expectations the owner is likely in dire financial straits.

---

[12] These are exceedingly common financing choices for small business owners. Alicia Robb, Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms, Commissioned by the U.S. Small Business Administration (Apr. 2013), https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf (last visited Mar. 12, 2019); Small Business, Credit Access, and a Lingering Recession, NFIB Research Foundation (Jan. 2012), https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-credit-study-nfib-2012.pdf (last visited Mar. 12, 2019).

[13] Such a case would likely be assessed under the *Penn Central* balancing test, assuming that other economically beneficial uses were still permitted. One would think that this should present a strong claim under *Penn Central* because the owner has suffered serious financial harm, his investment-backed expectations have been thwarted and the character of the government action may be highly questionable. Nonetheless, looking exclusively at the historical financial performance of this investment, the Federal Circuit's rule would deny takings liability because it would deny that there was any economic impact at all.

B. Review Is Appropriate to Resolve Conflict Among the Lower Courts Over Whether Prospective Economic Value Should be Considered in Assessing the Merits of a Regulatory Takings Claim

Scholars of all ideological stripes have called for this Court to provide guidance over how to apply the *Penn Central* factors.[14] Landowners, land use practitioners and regulators all need practical direction on assessing the economic impact of a newly imposed restriction under *Penn Central*. Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988) ("Takings law should be predictable… so that private individuals confidently can commit resources to capital projects."). As such, this case presents an opportunity to provide coherent guidance that will make *Penn Central* more predictable and fairer. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions."). But this case also presents an opportunity for this Court to lay down the law—for the sake of consistency in both *Penn Central* and *Lucas* cases—when assessing fair

---

[14] *See* Echeverria, 23 UCLA J. Envtl. L. & Pol'y 171, 210 ("attempt[ing] to inject more determinative meaning into the *Penn Central* analysis"); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 683 (2005) ("[The] U.S. Supreme Court has refrained from articulating usable rules that might enable lower court judges and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion."); *see also* Radford & Wake, 38 Ecology L.Q. at 732, n. 8 (cataloguing at least a dozen articles over only a five year period, with various scholars trying to decipher *Penn Central's* meaning).

market value for a property that is alleged to have prospective economic value for the buyer.

Under both *Penn Central* and *Lucas* the question of whether prospective economic value should weigh into the fair market valuation is highly relevant, and often outcome determinative. Here the Federal Circuit's rule—discounting evidence that the market may have valued a property higher, because of anticipated future profits—will categorically deny takings liability in any case when the property has operated at a net income loss. And for properties that have begun only to turn a modest profit, it will tip the *Penn Central* scales heavily in favor of the governmental defendant. But some lower courts take the exact opposite approach in accepting assertions of prospective economic value to defeat total takings claims under *Lucas*.

Properly construed, *Lucas* recognizes a total taking if the assailed regime either (a) denies all economically beneficial uses, or (b) renders the property completely valueless. *Lucas*, 505 U.S. at 1017 (analogizing total deprivation of beneficial uses: to a "physical appropriation."). But instead some of lower courts have narrowly construed *Lucas*, requiring a finding that the property is entirely without value.[15] In these jurisdictions a finding of any remaining economic value will sink a *Lucas* claim. It is therefore significant that several of these courts now hold that the possibility of prospective economic value is enough to defeat a *Lucas* claim. *See, e.g.,*

[15] *See, e.g., Robinson v. Baton Rouge*, 2016 WL 6211276, at *40 (M.D. La. Oct. 22, 2016) ("to prevail on a categorical takings claim, the property must lose all value."); *but see Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015).

Beyer v. City of Marathon, 197 So. 3d 563, 566–67 (Fla. Dist. Ct. App. 2013) (rejecting a *Lucas* claim because the city had assigned Rate of Growth Ordinance points with assumed economic value—*i.e.*, transferable redevelopment rights that another property owner *might* purchase [sometime in the future] to enable more intensive development elsewhere in the city).[16] For example, the Hawaii Supreme Court recently rejected a *Lucas* claim on the assumption that there must still be remaining value because an investor might be willing to pay something for the property because there is always a chance that existing restrictions might be lifted sometime in the indefinite future. *Leone v. Cty. of Maui*, 404 P.3d 1257, 1271–72 (Haw. 2017), *cert. denied*, _ S. Ct. _ (2019). *Cf.* Brown & Merriam, 102 Iowa L. Rev. at 1857–1858 ("The law is dynamic, and this dynamism, with the potential of favorable future regulatory change for a property owner, creates speculative value at some price point.").

Boiling all of this down, some courts are willing to predicate a finding of present fair market value on speculative and conjectural assumptions about the future. This plainly conflicts with the Federal Circuit's rule that present fair market value cannot be based on future assumptions, however well-grounded or non-speculative. At the very least this doctrinal tension shows the need for greater guidance

---

[16] *But see Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 2018 WL 3149489, at *10 (D. Haw. June 27, 2018) (holding that a taking may have occurred if "no competitive market exists *without the possibility of a legal change permitting development*…") (quoting *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996)) (alterations omitted).

on how courts should approach the economic analysis in regulatory takings cases.

One would expect courts to apply consistent analytical rules when assessing economic impact in *Penn Central* and *Lucas* cases. And there does not appear to be any principled basis for applying inconsistent rules. What is more, there is no doctrinally grounded way to resolve the tension between the approach that the Federal Circuit took in rejecting Petitioners' *Lucas* claim here (in ignoring prospective economic value) and the approach the lower courts have taken in other cases in denying *Lucas* claims based on assumed prospective value. *See Leone*, 404 P.3d 1257, 1271–72. The only common thread is that the owner loses, but for logically inconsistent reasons.

CONCLUSION

For the foregoing reasons the petition for *certiorari* should be granted.

Respectfully submitted,

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB Small Business Legal Center
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061 (Telephone)
(615) 916-5104 (Facsimile)
luke.wake@nfib.org

Thomas J. Ward
Devala Janardan
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200 (Telephone)
(202) 266-8400 (Facsimile)
TWard@nahb.org
djanardan@nahb.org

Ilya Shapiro
Trevor Burrus
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Kimberley S. Herman
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
(678) 269-4966
khermann@southeasternlegal.org

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com