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 OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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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?

3. Should the balancing test set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), be abandoned because it allows the public to benefit from non-nuisance-preventing regulatory burdens on individual property owners without the payment of just compensation, "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960)?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

As this Court has previously recognized, application of the *Penn Central* balancing test to deal with regulatory takings has proved "vexing" to the lower courts. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Even the so-called safe harbor provided by this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), has proved elusive. That is largely because the tests set out in both cases ask questions that not only should be irrelevant to a takings analysis, but actually undermine the very purpose of the Takings Clause.

The categorical taking test set out in *Lucas* requires the lower courts to address whether a "regulation denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, and then treat the regulation as a "per se taking under the Fifth Amendment" if it does, *Lingle*, 544 U.S. at 538. But as the decision below demonstrates, there is so much flexibility in assessing economic benefit that the *Lucas* safe harbor has proved to be no harbor at all.

The result is that almost all regulatory takings cases are addressed under the *Penn Central* balancing test. That test has been conceptually flawed from the outset, since it allows the government to "take" property for public benefit via regulation whenever the public benefit to be gained is greater than the economic value destroyed by the regulation, which is almost always. Yet that turns the Takings Clause on its head; it was designed, after all, to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

That such disregard for the fundamental property rights at stake can flow from a "vexing" application of this Court's regulatory takings jurisprudence demonstrates how much in need of revisiting that jurisprudence is.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Rejection of a Categorical Taking Demonstrates How Easy It Is For Governments To Avoid The Safe Harbor Established By This Court's Decision in *Lucas*.

As Plaintiffs have argued, and as the Court of Claims found, the prohibition imposed by the Wright Amendment Reform Act ("WARA"), Pub. L. No. 109-352, 120 Stat. 2011 (2006) on Plaintiffs' use of its leased property for airline passenger service regulated out of existence the only viable use of Plaintiffs' leasehold. Under *Lucas*, that should have been treated as a clear categorical taking. But because Plaintiffs' start-up efforts, hampered almost immediately by a years-long recession and the terrorist attacks of September 2011, had not yet turned profitable, the Federal Circuit determined that the use prohibition could not be a regulatory taking because, in its view, there was no economic value to the property prior to the regulation. Pet.App.17. This, after assuming that the WARA "legislation effectively barred plaintiffs from using [its airline] terminal for commercial air passenger service," *id. at* 13, and that "[t]his is the kind of government action that, in theory, might

amount to a regulatory taking," *id.* at 15. Significantly, the Federal Circuit's determination was directly contrary to the factual finding on valuation that had been made by the Court of Claims. *See id.* at 111 ("Had the WARA not been enacted, plaintiffs would have been able to realize the value of their leasehold. Instead, following the enactment of the WARA, the value of plaintiffs' property was reduced to zero").

The implications of the Federal Circuit's holding are far-reaching, and need to be considered by this Court. If true, every property held for future appreciation and use as market demands materialize could be regulated to bar the anticipated future profitable uses without any concern about the just compensation requirements of the Fifth Amendment's Takings Clause.

Lucas had already been relegated to little more than anomaly by this Court's subsequent decision in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which, by adding a temporal component in determining the total value of the regulated property, ensured that almost no regulatory interference with property rights would be treated as a categorical taking. *See id.* at 324 n.18 (describing *Lucas* has having "carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use"); *see also, e.g.*, Andrew S. Gold, "The Diminishing Equivalence Between Regulatory Takings and Physical Takings," 107 Dick. L. Rev. 571, 576-77 (2003) (describing the result in *Tahoe-Sierra* as "indicat[ing] that the *Lucas* per se taking rule will almost never be directly on point in regulatory takings cases"); *cf.* Richard A. Epstein, "The Seven

Deadly Sins of Takings Law: The Dissents in *Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955, 955 (1993) (describing the *Lucas* holding as applying only "to the tiny, and soon to be extinct, class of total regulatory takings"). The decision below places another, perhaps final, nail in the lid of that coffin. Review by this Court to restore the holding in *Lucas* is therefore warranted.

II. The Valuation Problems In the Federal Circuit's *Lucas* Analysis Are Magnified Under *Penn Central*, Which Erroneously Requires A "No Taking" Finding Whenever the Public Benefit Exceeds the Lost Value to the Property Owner Caused By the Regulation.

The Federal Circuit's rejection of the Court of Claim's valuation factual findings also infected its *Penn Central* analysis. But even absent that valuation problem, because the balancing of interests required by *Penn Central* is conceptually flawed, and the test itself needs to be reconsidered. That balancing test allows the government to prohibit, by regulation, non-harmful uses of private property if the public benefit to be gained exceeds the purported investment-backed expectations of the property owner. *Penn Central*, 438 U.S. at 127. That permits governments to do the very thing the Takings Clause was designed to prevent, namely, put the entire cost of a public benefit on the back of a single property owner.

Here, there is no argument that the prohibition on Plaintiffs' use of its leasehold as a passenger terminal was designed to prevent a nuisance, so the complete diminution in value caused by the prohibition is certainly a regulation that "goes too far" and for which compensation should be required. *Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393, 415 (1922) ("if regulation goes too far it will be recognized as a taking"). That such a regulatory taking can be deemed not even a taking under *Penn Central*, such that no compensation is due to the burdened private property owner for the public benefits derived at his expense, only serves to highlight the conceptual flaws with the balancing test itself.

Indeed, the problem here is even worse that is normally the case in *Penn Central* balancing cases, because the benefit of the taking at issue largely accrued to Plaintiffs' competitors rather than to the public as a whole, and as the Court of Claims found, was "clearly anticompetitive" as well. Pet.App.129 (citing *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F. Supp. 2d 538, 560 (N.D. Tex. 2007)).

Because *Penn Central* itself severely undermines property rights protected by the Fifth Amendment, certiorari is warranted here not only to address the application of that case's holding to the deprivation at issue here, but the holding itself.

CONCLUSION

The decision of the Federal Circuit below has far-reaching consequences that, if allowed to stand, will immunize government regulatory schemes from the just compensation requirements of the Fifth Amendment whenever the effected property owners have not yet begun to see the reasonably-anticipated return on their investments. Certiorari is warranted to correct such an application of this Court's regulatory takings jurisprudence.

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Respectfully submitted,

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