

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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**BRIEF OF JETBLUE AIRWAYS
CORPORATION AS *AMICUS CURIAE* 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 has 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?

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INTEREST OF *AMICUS CURIAE*¹

JetBlue Airways Corporation is the sixth largest airline in the United States, carrying over 42 million passengers to over 100 destinations annually. Since its founding in 1998, JetBlue’s fleet has grown to include over 250 aircraft that, collectively, complete more than 1,000 daily flights. Today, 19 years after its inaugural flight, JetBlue thrives as the sole post-1978 deregulation airline to survive into its second decade as a stand-alone carrier that has not merged, been acquired, or sought bankruptcy protection. It is the largest domestic airline at several airports across the nation, and J.D. Power awarded JetBlue the “Best Customer Service” award for 12 years in a row.

JetBlue’s success is due in large part to its access to key airport terminals. Since its infancy, JetBlue has both invested in airport infrastructure and battled for access to gates—including at the Lemmon Avenue Terminal at issue in this suit—so it could compete with major legacy carriers. While JetBlue has succeeded in securing gates at most key airports, the competition for access is fierce and shows no sign of abating because the demand for gates at key airports continues to exceed supply.

¹ Pursuant to Rule 37.2(a), *amicus curiae* timely notified the parties of its intent to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief’s preparation or submission.

JetBlue thus has a strong interest in encouraging private investment in airport infrastructure—an interest the Federal Circuit’s decision imperils. The decision reverses a \$133.5 million award of just compensation for government action that nullified petitioners’ leasehold interest in gates at Love Field Airport and sanctioned the destruction of their new terminal there. Pet. 1. The court’s reasoning departs from settled takings law in two fundamental respects: (i) it conditions the existence of a taking on whether property “revenue exceed[ed] * * * carrying costs” in the period before the challenged government action; and (ii) it confines the analysis of “reasonable investment-backed expectations” to “the regulatory environment at the time of” the adverse government conduct. Pet. App. 19, 21.

The petition warns that this decision “undercuts the ability of private parties to make prudent investments with the security” the Fifth Amendment guarantees, because the Federal Circuit’s definition of economic value effectively immunizes the government from just compensation claims by those who “invest for the long haul, understanding that they will incur carrying costs or operate a rental property at a loss in order to build future value.” Pet. 34. In an industry in dire need of private investment to meet growing customer demand, that result is dangerous indeed.

JetBlue’s experience in terminal access and investment illustrates the point, and highlights the practical and economic impact of the Federal Circuit’s misguided decision. JetBlue has grown through a series of investments in gate access and terminal infrastructure that have enhanced

competitive service offerings and lowered airfares across the industry. The resulting economic value to shareholders, customers, crewmembers, and the traveling public is undeniable. Yet under the Federal Circuit's decision, the government could destroy these investments without just compensation simply because their "revenue" did not exceed "carrying costs" at a particular moment. Pet. App. 19. This approach to the Fifth Amendment's just compensation guarantee is divorced from settled law and market realities, and absent review will threaten precisely the type of long-term investment that enabled JetBlue's success and remains vital to airline industry growth and competition going forward.

SUMMARY OF ARGUMENT

The legal and economic problems with the Federal Circuit's decision go well beyond the egregious facts of petitioners' case. The court's view of the economic value of long-term airport access and infrastructure investments will chill essential private financing of growth initiatives on grounds that have no valid basis in law or market practice. That is a result the country can ill afford in the face of increasing demand for air travel and competitive service offerings out of aging and congested airports.

The Fifth Amendment's protection of private rights in regulated property is well settled. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). Just compensation is likewise required

“where regulation denies all economically beneficial or productive use of land.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

In assessing the “economically beneficial or productive use of land” for just compensation purposes, this Court has long relied on the objective “concept of fair market value,” *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys.*, 441 U.S. 506, 511 (1979). This value reflects “what a willing buyer would pay in cash to a willing seller” at the time of the taking, *United States v. Miller*, 317 U.S. 369, 374 (1943), which in turn reflects “reasonable investment-backed expectations” about the property’s current *and future* use and regulatory treatment, *e.g.*, Pet. 26 (citing authorities).

The Federal Circuit’s decision breaks from these controlling and foundational underpinnings of property valuation in precisely the way the petition describes. *See* Pet. 20-27. In so doing, the decision does indeed subject “[a]ny vacant building, undeveloped land, or underperforming leasehold” to an “uncompensated *Lucas* taking.” *Id.* at 20. But that is not all. The Federal Circuit’s decision goes so far as to subject *perfectly performing* leasehold or property interests to uncompensated government destruction by employing an economic value test divorced from the concept of fair market value this Court has long applied to the Fifth Amendment’s just compensation guarantee. The Court need look no further than JetBlue’s history to understand why.

As detailed below, JetBlue grew out of a series of discrete airport investments that over time resulted in expanded service offerings, lower fares, and other obvious economic benefits to JetBlue

shareholders, customers, crewmembers and the traveling public. These benefits are publicly documented across a range of financial metrics. But under the Federal Circuit's decision, any number of them could be judged worthless—and thus fair game for uncompensated government destruction—simply because their “revenue” did not “exceed * * * carrying costs” at a particular time. Pet. App. 19.

This approach to assessing the economic value of property rights cannot be reconciled with the extensive factual record in this case. Pet. 16-19. Further, and critically, it disregards an array of economic measures and investment-backed expectations that define property valuation and investment in the real world. JetBlue's investment in new gates and routes, at slot controlled airports or not, are planned with a “ramp up” period often as long as several years. And a cursory review of public information reveals that JetBlue and other carriers assess the market value of such investments through the lens of multiple financial metrics and anticipated regulatory treatment, *not* the artificial snapshot of “revenue” to “carrying costs” and “current regulatory treatment” the Federal Circuit used to define petitioners' protected property rights out of existence. Pet. App. 19, 21.

“Takings law should be predictable * * * so that private individuals confidently can commit resources to capital projects.” Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). The stakes are high: in 2017 alone, private investment in North American real estate exceeded \$70 billion. See McKinsey & Co., *The Rise and Rise of Private Markets: McKinsey Global Private Markets Review* 6 (Feb. 2018). Such

investments are particularly critical in the airline industry, where private funding of regulated facilities will remain essential to meeting increased consumer demand and facilitating competitive service offerings. The Federal Circuit's decision will deter and destabilize such investment in conflict with this Court's precedents and market realities. Review is warranted.

REASONS FOR GRANTING THE PETITION

I. The Airline Industry Depends on Private Investment in Regulated Property

A 2018 Federal Aviation Administration Report acknowledges that “[a]ccess to a reliable worldwide aviation network is essential to the health of the U.S. economy.”² That it is. In 2014 alone, United States aviation accounted for 5.1% of United States gross domestic product and generated 10.6 million jobs and \$447 billion in earnings.³

Government statistics further demonstrate that passenger demand for air travel is “grow[ing] at a faster rate than the economy.”⁴ In 2014, air carriers transported over 871.8 million passengers.⁵ That number has grown, and in 2018 JetBlue alone transported approximately 42 million passengers.

² FAA, *National Airspace System Capital Investment Plan – FY2018-2022* 4, available at https://www.faa.gov/air_traffic/publications/cip/files/FY18-22/FY18-22_CIP_Complete_Nov_2017.pdf (last accessed Mar. 14, 2019).

³ *Id.*

⁴ *Id.* at 5.

⁵ *Id.*

Further, from now until 2037, the FAA expects that passenger air travel will grow by 2.4% on an annual basis.⁶

The airline industry's ability to accommodate this traffic depends on access to airport terminals and infrastructure, which in turn depends heavily on both future regulatory treatment and private investment. JetBlue's own history illustrates the point, and highlights how the Federal Circuit's departure from this Court's precedents and basic market economics will threaten industry access to regulated facilities and capital-intensive infrastructure going forward.

A. The Value of Property Interests in the Airline Industry Is Tied to Expectations of Future Regulatory Treatment

When JetBlue began operations at John F. Kennedy International Airport ("JFK") in 2000, it was fully dependent on the unprecedented slot exemptions it received from the United States Department of Transportation. Only with this federal grant of access was JetBlue able to compete successfully with legacy carriers during the five peak slotted hours of the day. In connection with its commitment to access, JetBlue subsequently lobbied the Long Beach City Council to amend its local airport slot rules to extend the time in which JetBlue had to "use or lose" its twenty-seven slots at LA's then-dormant secondary airport, Long Beach Municipal Airport. JetBlue likewise negotiated for years with the US DOT and the FAA to gain access

⁶ *Id.*

to slots at New York's LaGuardia Airport, Chicago's O'Hare Airport, and other federally-regulated terminals.

In 2006, JetBlue's access efforts included negotiations for space at the Lemmon Avenue Terminal at issue in this case. Isolated from other carriers and newly constructed, the Lemmon Avenue Terminal fit JetBlue's growing low-fare, high-frills brand, and provided an attractive option for serving the Dallas market despite then-current regulatory restrictions. Well aware that changes to the Wright Amendment were required to accommodate its desired route strategy for the Lemmon Avenue Terminal, JetBlue began discussions with federal officials, airport officials, and members of Congress. The Wright Amendment Reform Act ("WARA") mooted those efforts, and stymied JetBlue's hopes of gaining competitive access to Dallas through Love Field.

Notwithstanding this setback, JetBlue—like many other airlines—has continued to invest in airport access and infrastructure subject to investment-backed expectations about current *and future* regulatory treatment. The law has long countenanced such expectations as both reasonable and necessary to the valuation of long-term, capital-intensive property investments. *See, e.g.*, Pet. 20-29 (citing authorities); Bd. of Governors of the Federal Reserve Sys., *Branch & Agency Examination Manual* § 3100.1 (Real Estate Loans) at 13-14 (Sept. 1997) (emphasizing that a future "change in zoning" could "cause material changes to reported [property] values" and impact the "useful life of an appraisal or evaluation" of a property as well as its cost of capital). Yet the Federal Circuit's opinion disregards

these legal and economic precedents in favor of an artificial inquiry focused on the “current regulatory regime.” Pet. App. 21. This aspect of the opinion alone warrants review.

B. Private Investment Is Critical to Airline Industry Competition and Growth

Although JetBlue has long and successfully lobbied for expanded access at existing terminals, regulatory authorizations at such facilities will not alone allow JetBlue or other carriers to keep up with the increased demand for air travel. Investment in new facilities is necessary. According to Airports Council International (“ACI”), procuring investment “remains a challenge for all but the most commercially successful airports,”⁷ in large part because “airports are asset-intensive businesses that require significant capital investment that may take many years to recover.”⁸

Because the federal government’s contributions are typically time consuming and often fall short of the funds necessary to revamp airport infrastructure,⁹ private investment must fill the gap.

⁷ *ACI World Report* 49 (Aug. 2017), available at <https://aci.aero/news/aci-world-report/>.

⁸ *Id.*

⁹ See American Society of Civil Engineers, *2017 Infrastructure Report Card*, available at <https://www.infrastructurereportcard.org/the-impact/economic-impact/> (last accessed Mar. 6, 2019) (showing a \$42 million funding gap in airports); Amy Zipkin, *Private Money Takes on Bigger Role in Airport Projects*, N.Y. Times (Mar. 3, 2019), available at <https://www.nytimes.com/2019/03/03/business/airport-projects->

JetBlue's experience again illustrates the point. In 2008, JetBlue opened a state-of-the-art terminal, known as "T5," at JFK Airport in New York. In its current state, T5 has added 29 gates at JFK, allowing JetBlue and other airlines to grow in New York, serve more passengers, and relieve airport congestion. So, too, JetBlue invested \$75 million in new gates at Washington's Reagan National Airport in 2014, understanding the value and return time on this investment could vary based on a variety of factors including future regulatory treatment.¹⁰

JetBlue is now involved in a proposal for an additional terminal development project at JFK Airport notwithstanding the existence of slot restraints. Like petitioners' investment in the Lemmon Avenue Terminal, JetBlue's investment in this project was informed by certain predictions, notably that with enhanced air traffic control efficiencies, the FAA's slot constraints will one day relax. Such predictions often and rightly accompany investments in airport infrastructure, which JetBlue and other stakeholders do not evaluate solely on the parochial revenue-to-cost metric the Federal Circuit seized upon to reverse the just compensation judgment in this case. Instead, these sophisticated stakeholders assess and forecast the value of access

private-investment.html (citing an "Airport Council International report released in 2017 estimat[ing] that airports would need almost \$100 billion for capital projects over the next five years, but would only be able to finance about half that amount.").

¹⁰ See, e.g., JetBlue Airways Corporation Annual Report, at 31 (Dec. 31, 2015).

and infrastructure investments over time and a variety of financial metrics that are evident from public market information and long-term performance results,¹¹ but are disturbingly absent from the Federal Circuit’s new takings test.

For example, from 2010 through 2016, JetBlue invested in access to new routes from Boston Logan to Washington Reagan National Airport (2010), Washington Reagan to Jacksonville (2014), Boston Logan to Cleveland (2015), and Boston Logan to LaGuardia (2016).

The statistics on increased passenger travel and fare reductions following these investments are noteworthy. For example, on the Boston-LaGuardia route, average daily passenger traffic increased by approximately 40%, and fares fell by a maximum of 69%, over the prior year. On the Boston-Reagan National route, industry passenger traffic per day increased by over 70% over the prior year, accompanied by a maximum fare decrease of 73% over competing fares in that time period, and an average fare reduction of around 24% over the six-month period before entry to the end of the six-month period following entry.¹²

The long-term economic value that these investments delivered to JetBlue shareholders, customers, crewmembers and the traveling public

¹¹ See, e.g., *id.*; Statement of D. Barger, President and Chief Executive Officer, JetBlue Airways Corporation Annual Report (Dec. 31, 2010) (describing airport access and infrastructure investments as part of a “Building Year”).

¹² Statistical sources on file with *amicus curiae*.

are undeniable, just like the economic value the record ascribes to various investments at Love Field. The Court of Claims “awarded \$133.5 million in just compensation” for “the value of petitioners’ interest in the Master Lease and terminal,” Pet. 16 (citing App. 133-39, 147-54), which included “six gates” at Lemmon Avenue as well as expansion options and various real estate interests, *id.* at 10. This award seems eminently reasonable, if not modest, in relation to record evidence of other asset values at Love Field, including evidence that in “2014, Southwest paid \$120 million to acquire the lease rights to two of the 20 gates” there. *Id.* at 32. The value of gate access at Love Field is further reflected in public sources stating that “by 2015, Delta reported that it had gained around \$230 million in revenue a year from customers who shifted from flying out of [Dallas-Fort Worth International Airport] to Love Field.” *Id.* (internal quotation marks and citation omitted).

All of these significant real-world valuations concern long-term investments in regulated airport access and infrastructure that the Federal Circuit’s opinion deems completely worthless if investment “revenues” do not “exceed * * * carrying costs” at a particular moment in time. Pet. App. 19. That makes no sense.

II. The Federal Circuit’s Decision Will Stifle Critical Industry Investment and Access

JetBlue is currently the largest domestic or international carrier at several airports across the nation, including JFK, Fort Lauderdale-Hollywood International Airport, and Boston’s Logan Airport. However, JetBlue and other carriers must pursue additional access and new infrastructure to continue

to grow and meet increasing customer demand. For this reason, the Federal Circuit’s decision is not only contrary to law and industry history; it is also a significant impediment to future competition and growth in the airline and other sectors that depend on long-term private financing for capital-intensive investments.

The benefits of such investments are well documented. Private financing of public facilities can “mitigate the overruns and schedule delays that plague traditional infrastructure project delivery by clearly delineating governance, allocating shared risk, integrating resources, applying best practices, and establishing a life cycle-long perspective of costs and accountability.” Michael D. Rocca, *The Rising Advantage of Public-Private Partnerships*, McKinsey & Co. (July 2017). Yet such investment is exactly what the Federal Circuit’s decision unjustifiably deters in contravention of its own precedents and controlling decisions from this Court.

Federal Circuit decisions recognize that “in the real world, real estate investors do not commit capital * * * to undevelopable [or otherwise useless] property.” *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015) (quotation marks and alteration omitted); *see also, e.g., Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (“A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose.”). This principle is evident in the investments petitioners made at Love Field, and the investments that JetBlue and other carriers have made—and continue to make—at airports across the country: namely, long-term private investments in

airport access and infrastructure that are based on objective market and regulatory expectations, *see* Pet. 20-25, as well as the Constitution's promise that the risk of investment loss through government action will be offset by the guarantee of just compensation. *See id.* (citing authorities).

The Federal Circuit's decision upends this bedrock protection and sanctions government interference with protected property rights on terms antithetical to investment realities and the fundamental purpose of the Takings Clause, which is to discipline the use of the "political process * * * to impose the costs of a [perceived] public good on a single owner." Aaron N. Gruen, *Takings, Just Compensation, and the Efficient Use of Land, Urban, and Environmental Resources*, 33 *The Urban Lawyer* 517, 536 (Am. Bar. Ass'n 2001). Properly applied, the just compensation requirement imposes this discipline by "demonstrat[ing] that actions that may appear to be in the public interest when they are 'free'—that is, when the political decision-makers don't bear the costs—are not necessarily attractive government programs once the political decision-makers must bear the budgetary costs of their actions." Henry N. Butler, *Regulatory Takings After Lucas*, 3 *Regulation* 76, 81 (Cato Rev. of Business & Government 1993).

That is what the record illustrates here. *See* Pet. 1, 31. Absent review, the decision below will not only harm the airline industry and its customers and investors; it will unnecessarily burden federal, state, and local governments with the cost of lost private investment and the political and economic impact of decreased competition and stymied growth in the burgeoning market for air travel.

For all of these reasons, the Federal Circuit's decision to disregard settled law and market practices in favor of an artificial definition of property value should be not be countenanced. Private investment, however savvy and aware of politics in Washington, cannot reasonably bear the risk of loss the Federal Circuit's just compensation test threatens, especially in the context of airport infrastructure improvements with long term capital costs complicated by regulatory contingencies.¹³

This case is a strong vehicle for addressing the conflict between the Federal Circuit's decision and this Court's precedents, and for reaffirming a market-based and administrable standard for valuing long-term private investments in regulated properties essential to competition and growth in the airline industry and other critical sectors of the economy.

CONCLUSION

Petitioners' request for a writ of certiorari should be granted.

¹³ See *ACI World Report*, *supra* note 7, at 49 (“[A]irports are asset-intensive businesses that require significant capital investment that may take many years to recover.”).

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