No. 14-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOST TREE VILLAGE CORPORATION,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant

On Appeal from the United States Court
of Federal Claims in Case No. 1:08-cv-117-CFL
Honorable Charles F. Lettow

CORRECTED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PLAINTIFF-APPELLEE, LOST TREE VILLAGE CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Amicus Curiae National Association of Home Builders, a trade association, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

DISCLOSURE PER RULE 29, FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Federal Rule of Appellate Procedure 29 (c) (5), Amici Curiae state:

(A) the amicus curiae brief was authored by attorneys of the Pacific Legal Foundation, and no portion was authored by counsel for any party;

(B) funding for preparation of the amicus curiae brief was provided by Pacific Legal Foundation, and no party or party's counsel, contributed money that was intended to fund preparing or submitting the amicus curiae brief;

(C) no person, other than the Amicus Curiae Pacific Legal Foundation, contributed money that was intended to fund preparing or submitting the amicus curiae brief.

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CONSENT OF PARTIES

Pursuant to Federal Rule of Appellate Procedure 29, Amici Curiae Pacific Legal Foundation (PLF) and National Association of Home Builders (NAHB) hereby state that all parties have consented to the filing of this amicus curiae brief.

INTEREST OF AMICI CURIAE

PLF is a nonprofit public interest law foundation that for more than 40 years has litigated in support of the right to use property free of intrusive government interference. PLF attorneys have appeared before the United States Supreme Court as counsel of record in several landmark property rights cases. *E.g.*, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). PLF also participated as amicus curiae in earlier stages of this case. *E.g.*, *Lost Tree Vill. Corp. v. United States* (*Lost Tree II*), 707 F.3d 1286 (Fed. Cir. 2013).

NAHB is a Washington, D.C., based trade association whose mission is to improve the climate for housing and the building industry. Founded in 1942, NAHB is a federation of more than 800 state and local associations with 160,000 members. Its members annually construct about 80% of new homes in the United States. NAHB frequently participates in federal courts as a party litigant or amicus curiae in cases involving landowners hurt by excessive regulation. *E.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." It "was 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It secures compensation for individuals when the government physically appropriates or invades property or when its restrictions "go too far" in taking the use of land. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("it is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

The Supreme Court has identified two situations where a regulation goes "too far," constituting a per se regulatory taking. *Lingle*, 544 U.S. at 538. First, if government requires an owner to suffer a permanent physical invasion of his property a taking occurs. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, a taking also occurs if a regulation deprives an owner of "all economically beneficial use" of the property. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Outside of these "per se" categories, courts apply

"essentially ad hoc, factual inquiries," balancing the economic impact and character of the action according to *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), to determine whether a taking occurs. *Lingle*, 544 U.S. at 538-39.

In this case, according to the facts found by the trial court, Lost Tree suffered a "categorical taking" under *Lucas*. *Lost Tree Vill. Corp. v. United States (Lost Tree III)*, 115 Fed. Cl. 219, 231 (2014). Even were that not so, the factors in *Penn Central* likewise demonstrate a taking occurred under that case. *See id*. While the government asks this Court to focus on the assertion that Lost Tree's land could be sold for more money than its original price, that argument is misleading, irrelevant under *Lucas* and *Penn Central*, and obscures the fact that the government is attempting to force Lost Tree to bear a burden that in "all fairness and justice" should be borne by the community as a whole. *See* Brief of United States as Appellant at 31-33.

ARGUMENT

I

LOST TREE SUFFERED A COMPENSABLE TAKING UNDER *LUCAS*

A categorical *Lucas* taking occurs when government "regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. In *Lucas*, the Supreme Court explained that "when the owner of real property has been

called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U.S. at 1019. That's at least in part because, "requiring land to be left substantially in its natural state" suggests "that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. 1003, 1018. In other words, it is unfair to force one property owner to lose the use of his land in the name of the common good, because it forces him to bear the burden of keeping land in its natural state—something which is purportedly for the good of all. *See Armstrong*, 364 U.S. at 49.

The trial court correctly found that the government denied Lost Tree all economically viable use of the land, leaving only "nominal" use (e.g., for relaxation) when it denied Lost Tree its permit in 2004—a loss of 99.4% of the property's value. *Lost Tree III*, 115 Fed. Cl. at 228, 231 (the land's value before the permit denial was $4,217,887.93, compared to the "nominal value" of $27,500 after the denial). Despite this devastating loss, the government argues that a taking judgment is inappropriate because the land today allegedly has a higher dollar value than when Lost Tree bought it in 1974—forty years ago. Brief of the United States as Appellant at 31. The government's theory is wrong, because *Lucas* applies even when land retains some innate value. Moreover, the value of the land in 1974 is irrelevant in a *Lucas* analysis.

A. *Lucas* Categorically Applies When the Government Takes All Economically Viable Use of Land, Regardless of Whether the Landowner Is Left with a "Token" Interest

All land has some inherent value, even land that cannot be put to "economically beneficial or productive use." *See* James Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed?*, Takings Sides on Takings Issue: Public and Private Perspectives at 456, 471 n.7 (2002) ("About the only conceivable instance where land has no value, *at least in the short term*, might be where its liabilities—say, from toxic waste contamination—exceed its utility.") (emphasis added). But inherent value is not enough to evade *Lucas*. *Id*. at 466. In fact, the coastal property in *Lucas* itself retained the same kind of non-economically viable uses and residual value as the property in this case. *See* 505 U.S. at 1044 (Blackmun, J., dissenting) (parcel retained value despite its lack of economically viable use). In *Lucas*, the government argued that the landowner's property "retain[ed] substantial economic value" in spite of the law forbidding permanent structures. Respondent's Brief on the Merits, *Lucas v. South Carolina Coastal Council,* 1992 WL 672613 at *45 (Jan. 31, 1992). As here, the property could be used for "passive and recreational use" and other "purposes short of permanent, residential development." *Id*. The Supreme Court rejected these arguments, instead establishing the rule that landowners must be compensated when the government takes "all economically beneficial or productive use of land." *Lucas*,

505 U.S. at 1015. The Court emphasized that a categorical regulatory taking occurs when government takes all economic *use* of land, not the monetary value. *See id.*; *id*. at 1016 ("economically viable use"); *id*. at 1018, 1019, 1027, 1029 ("economically beneficial use"); *id.* at 1028, 1029 ("economically productive use"); *id.* at 1028 ("economically valuable use"); *id.* at 1012 ("temporary deprivations of use are compensable"); *id.* at 1016 n.7 ("economically feasible use"). The qualifier for a categorical taking under *Lucas* is not whether land is left with some monetary value, but whether it is left economically idle—without economically viable *use*. *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 486 (2011) (*Lucas* "focuses on whether a regulation permits economically viable use of the property, not whether the property retains some value on paper."); Burling, *supra* at 467-68.

Lucas based its rule on numerous Supreme Court decisions recognizing that a taking occurs when an owner loses economically viable use of the land. *See* 505 U.S. at 1015-16. For example, in *Pennsylvania Coal*, the Court found the government had gone "too far," 260 U.S. at 415, effecting a taking, because the regulation had made it "commercially impracticable to mine." *Pennsylvania Coal*, 260 U.S. at 414. In support of its rule, the Court in *Lucas* cited *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987) and *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.,* 452 U.S. 264, 296 (1981), cases in which the Court looked to whether the landowners could still make economically viable *use* of their land.

Lucas, 505 U.S. at 1015; *see also*, *e.g.*, *United States v. Causby*, 328 U.S. 256, 261-62 (1946) ("If, by reason of the frequency and altitude of the flights, respondents could not *use* this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it. . . . The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed.") (emphasis added); *Penn Central*, 438 U.S. at 138 n.36 ("if appellants can demonstrate at some point in the future that circumstances have so changed that the terminal ceases to be 'economically viable,' appellants may obtain relief").

More recently, in *Palazzolo*, the Court again explained that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." 533 U.S. 606, 631 (2001). There, the Court decided that the government action did not qualify as a per se taking under *Lucas*, because it permitted the landowner to build a "substantial residence" on his parcel of land. *Id*. The ability to build a "substantial residence" necessarily means that land will not be left "economically idle" and should be analyzed under *Penn Central* instead of *Lucas*. In contrast, in this case, the government denied Lost Tree the ability to build anything on the land. The government, nonetheless, is arguing that the land has significant monetary value. Brief of the United States as Appellant at 32.

To suggest that government regulations must literally take the full monetary value of land away would absolve the government from ever committing a *Lucas* taking, because even land dedicated for perpetual conservation retains monetary value, as demonstrated by assessments that may leave owners of conservation land with significant tax liability. *See*, *e.g.*, *Butler v. C.I.R., T.C. Memo*. 2012-72, 2012 WL 913695 (2012) (estimating monetary value of land dedicated to conservation). The government's proposed interpretation of *Lucas* would create an exception that would swallow the rule, because all land has innate value of some kind.

B. The Original Purchase Price Is Irrelevant Under *Lucas*

The government is also asking this Court to use an inappropriate and illogical time frame. Brief of the United States as Appellant at 31. Under a proper takings analysis, economic loss is valued at the market value at the time of the taking, not from the date of purchase. *See Keystone*, 480 U.S. at 497 ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property"); *Palazzolo*, 533 U.S. at 639 ("T]he amount of the award is measured by the value of the property at the time of taking[.]"); *Olson v. United States*, 292 U.S. 246, 255 (1934). Measuring the lost value from the time of the taking is an old rule that benefits both the government and individuals. As the Supreme Court explained in *Olson*, using the landowner's purchase price—in this case the price of the parcel in 1974—as compared to the market value at the time of

taking could hurt the government when land drops in value, or give the government an unfair windfall when land prices increase.

> [The landowner] may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes, and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. . . . [The landowner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.

Olson v. United States, 292 U.S. at 255.

If courts looked to the landowner's purchase price to decide whether a *Lucas* taking occurred, a landowner would have an easier time demonstrating a regulatory taking if he paid an exorbitant purchase price. *See id*. On the other hand, a landowner who inherits land or who gets a great deal for it would have a harder time demonstrating a taking of the same piece of property. "The problem involves more than untangling the complexities of inflation and the general effects of government regulation on land prices in the area[.]" Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 407, 421-22 (2013). The government's purchase-price test would fail to acknowledge the owner's hard work and his improvements to the land. *Id*. It would also fail to account for "a dramatic increase in land values in the area occasioned by factors such as its becoming a trendy tourist destination, the center of a dynamic new industry, or the

scene of newly discovered mineral wealth." *Id*. Even when the owner could prove that regulations had significantly impaired the property's value, the owner would automatically lose if the price after regulation were more than what he paid. *Id*.

The government's proposed test has other problems. For example, it proposes to consider the purchase price investment, but ignores other investments in the land. Planning and permit applications alone can be quite expensive. In the case of 404 fill permits, "[t]he average applicant for an individual [404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (footnote omitted). The government is not proposing to adjust the purchase price according to inflation and investments in the land, which in this case must be substantial. Rather, it is proposing a test that would work in its favor when the market or landowners improve the value of their land, and that would hurt the government when the market or the owner diminishes the value. Fortunately, that is not the test espoused by our Supreme Court or the Takings Clause. And the lower court correctly used the market value at the time the regulatory taking occurred—when the government denied Lost Tree its permit.

II

EVEN IF *LUCAS* DID NOT APPLY, LOST TREE WOULD HAVE SUFFERED A *PENN CENTRAL* TAKING

Outside the context of *Lucas* and *Loretto* per se regulatory takings cases, to evaluate whether government regulations rise to the level of a taking, courts should conduct a factual inquiry based on the factors listed in *Penn Central*. *Lingle*, 544 U.S. at 538-39 (2005). *Penn Central* listed three of those factors: the economic impact of the regulation, the landowner's interference with investment-backed expectations, and the character of the governmental action. 438 U.S. at 124. In *Lingle*, the Supreme Court clarified that the "economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" is "[p]rimary among those factors." 544 U.S. at 538-39. The Court stated that the third factor, the character of the governmental action "*may* be relevant in discerning whether a taking has occurred." *Id*. at 539 (emphasis added).

"When considering *Penn Central's* economic impact factor, a court must 'compare the value that has been taken from the property with the value that remains in the property.'" *Maritrans Inc. v. United States*, 342 F.3d 1344, 1358 (Fed. Cir. 2003) (quoting *Keystone*, 480 U.S. at 497). In this case, the lower court determined that impact was considerable: a diminution of value from $4,245,387.93 to

$27,500—a loss of 99.4% of the property's value. *Lost Tree III*, 115 Fed. Cl. at 231. The Court must balance this enormous loss with the relative weight of the other factors. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009). In other words, the greater the loss, the more heavily the other factors must weigh to justify the uncompensated taking of economic value.

As explained above, the Court cannot use the initial purchase price to determine the *economic impact* on the plaintiff, because that would create a series of absurdities, making the existence of a regulatory taking dependent on whether the landowner paid a good price or an exorbitant one, and it would ignore an increase or decrease in land's value due either to effort or providence. Rather, the purchase price has weight only as evidence of investment backed expectations—not of the economic impact.

The other prongs—the investment-backed expectations and the character of the government actions—were already settled by this Court. *See Lost Tree II*, 707 F.3d at 1294. "The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations" for Plat 57. *Id*. Similarly, this Court did not remand the "'character of the governmental action' prong." *See id*. However, the government insists that it may revisit those issues and that they outweigh any economic loss suffered by Lost Tree. *See* Brief of the United States as Appellant at 34.

Even if both factors were not settled, they would have to weigh significantly in favor of the government to overcome the weight of the economic loss in this case. The government claims that Lost Tree lacked sufficient investment-backed expectations, because the regulatory scheme requiring a fill permit pre-existed Lost Tree's purchase and the character of the government action was for the common good, because it protected wetlands. *See* Brief of the United States as Appellant at 38-45. The Supreme Court has already rejected the government's argument here, calling it "capricious," "quixotic," and " too blunt an instrument to accord with the duty to compensate for what is taken." *Palazzolo*, 533 U.S. at 609. The investment-backed expectation prong does not mean that a buyer loses the right to challenge a pre-existing regulatory scheme as effecting a regulatory taking. *Palazzolo*, 533 U.S. at 627. Moreover, "[n]either *Penn Central* nor subsequent [cases] have contained even the hint of a suggestion that an owner would have a less viable claim if the property were an inherited family business, a devise from a distant relative, or even a prize in a lottery." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. Rev. 899, 913 (2007). Rather, the prong is more interested in "an appeal to fairness in the intuitive sense that the pang of the loss of a sought after advantage might be greater than the pang of a windfall not received." *Id.*; *see also Kaiser Aetna v. United States*, 444 U.S. 164, n.2 (1979) (Blackmun, J., dissenting). If that is the measurement, then Lost Tree surely

knows the pang of loss, since it had every reason to believe it could obtain a 404 permit, and invested in the process accordingly. *See Lost Tree Vill. Corp. v. United States (Lost Tree I)*, 100 Fed. Cl. 412, 438 (2011).

Regarding the character prong (which may not be applicable under *Lingle*), the government misunderstands the importance of its intent to promote the common good in the *Penn Central* takings analysis. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416; *see also Lingle*, 544 U.S. at 544 ("[T]he gravamen of Chevron's claim is simply that [the regulation] will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause."). Rather, many scholars—from both the "left" and "right"—agree that the character prong is more of a "smell test," grounded in fairness. *See*, *e.g.*, R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 737 (2011); John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 A.L.I.-A.B.A. 143, 159-60 (June 9-10, 2005). And if fairness is the test, then the character prong weighs in favor of Lost Tree, because the government admitted to treating Lost Tree worse than it would have treated another applicant and because according to the state, "the wetlands at issue were of marginal value." *Lost Tree I*, 100 Fed. Cl. at 438 *rev'd on*

other grounds, 707 F.3d 1286 (Fed. Cir. 2013) ("The Corps' denial, however, was targeted to Lost Tree. If an individual or small developer other than Lost Tree had pursued a fill permit for Plat 57, the Corps conceded that they would have received far different treatment than Lost Tree.").

Even if the government's assertions about the character of the regulation and Lost Tree's investment-backed expectations were true, Lost Tree's extreme economic loss would still outweigh both prongs. "Any significant depreciation in value should . . . presumably 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." Radford & Wake, *supra* at 738. The Court suggested such a balancing act in *Penn Central* when it suggested that the plaintiffs could obtain relief, "if [they] can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable.'" *Penn Cent.*, 438 U.S. at 138 n.36. It is difficult to imagine an expectation or a government action's character that could empower government to strip land of more than 99 percent of its economic value without paying compensation. Such extreme justifications surely do not exist here.

CONCLUSION

Lucas and *Penn Central* recognize that government may regulate property in ways that "to some extent" affect land values. *Lucas*, 505 U.S. at 1017 (quoting

Pennsylvania Coal, 260 U.S. at 415); *Penn Central*, 438 U.S. at 124. But when a "regulation goes too far it will be recognized as a taking." *Lingle*, 544 U.S. at 538 (quoting *Pennsylvania Coal*, 260 U.S. at 415). If *Lucas* or *Penn Central* are to have any meaning at all, then this case must qualify first as a *Lucas* taking and then as a *Penn Central* taking.

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Respectfully submitted,

By:______________________________

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 3,836 words.

____

MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed on October 2, 2014, with the United States Court of Appeals for the Federal Circuit using the CM/ECF system. All case participants are registered CM/ECF users and will be served by the CM/ECF system.

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MARK MILLER