No. ______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1999, petitioners paid millions of dollars to acquire the lease to property designated for aviation use at Dallas Love Field Airport. The next year, they spent another $17 million constructing a state-of-the-art terminal, and a few years later they expanded their investment by another $6.5 million. At the time, federal law limited flights for aircraft with over 56 seats from Love Field to destinations in Texas and neighboring states. Petitioners believed that their property was valuable even with those restrictions, especially given the fact that a new generation of regional jets carrying 56 passengers or fewer could service destinations from Dallas to either coast. But they and the market also anticipated that the restrictions would not last, as Congress had already relaxed them once. Petitioners and the market were proven prescient when, in 2006, Congress further eased the restrictions. But rather than enjoy the fruits of their investment, petitioners saw its value wiped out, as the federal law that lifted flight restrictions did so at petitioners' expense, mandating that petitioners' terminal be demolished and "never again be used for passenger service."

The Court of Federal Claims found a taking and ordered $133.5 million in just compensation. But the Federal Circuit reversed, holding that the federal government's taking of property in which petitioners had invested tens of millions of dollars had no economic impact at all.

The questions presented are:

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?

PARTIES TO THE PROCEEDING

Petitioners Love Terminal Partners, L.P., and Virginia Aerospace, LLC, were the plaintiffs in the Court of Federal Claims and appellees below.

Respondent the United States was the defendant in the Court of Federal Claims and the appellant below.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns 10% or more of stock in Love Terminal Partners, L.P., or in Virginia Aerospace, LLC.

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PETITION FOR WRIT OF CERTIORARI

This case arises out of a classic effort to "forc[e] 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). Petitioners invested tens of millions of dollars in a leasehold at Dallas Love Field Airport on the reasonable and investment-backed view that it was valuable even with the flight restrictions then imposed, and that those unusual restrictions would eventually be eased. Lifting the restrictions had powerful supporters, such as Southwest Airlines, and powerful opponents in American Airlines and the operators of Dallas-Fort Worth Airport (DFW). Eventually, five interested parties—Southwest, American, DFW, and the Cities of Dallas and Fort Worth—got together and did what every oligopoly would do if they could get away with it: They reached a compromise at the expense of the people not in the room.

In particular, the five parties agreed to relax the restrictions on flights out of Love Field, but to limit the number of flights operating at Love Field by precluding the use of petitioners' leasehold for flights and ordering the destruction of petitioners' newly built terminal. Because only the federal government can regulate (or deregulate) interstate air travel, this agreement required Congress' imprimatur. Congress ultimately provided that imprimatur in the form of the Wright Amendment Reform Act, or "WARA."

The Court of Federal Claims had no trouble recognizing this as an obvious taking, and ordered the federal government to compensate petitioners for the

reasonable value—$133.5 million—of the property that had been rendered economically useless. The Federal Circuit reversed and declared petitioners entitled to nothing at all. The court did not reach that remarkable result by questioning the finding that WARA rendered petitioners' property valueless or by overturning the trial court's other evidentiary determinations. Instead, the Federal Circuit concluded that the property in which petitioners had invested tens of millions of dollars was *worthless* even before WARA, simply because it did not generate a positive cashflow at the time of the taking. In the Federal Circuit's misguided view, the federal government had done petitioners a favor by wiping out their multi-million-dollar investment because the investment had not yet generated positive cashflow.

That investment-chilling decision alone would merit this Court's review, as it paves the way for the federal government to destroy the value of any vacant building, undeveloped land, or other valuable investments generating negative cashflows at the time of the taking without paying a dime. But the Federal Circuit exacerbated the damage by holding that, in determining whether a taking has any economic impact, courts can and must ignore reasonable, investment-backed expectations that regulatory restrictions affecting the property are unsustainable. The Federal Circuit applied that mistaken rule here even though the market's perception that the restrictions on Love Field were unsustainable was not only reasonable but effectuated in the very legislation that destroyed the value of petitioners' property. The fact that WARA's "compromise"—less competition and more lucrative

flights for others, but no flights at all from petitioners' property—was reached by five parties at the expense of parties not in the room should have made the taking unmistakable. But under the Federal Circuit's fundamentally misguided analysis, that obvious taking was instead unrecognizable.

The decision below conflicts with this Court's precedent, especially *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), with the Takings Clause's guarantee of just compensation, and with basic realities of how the market values property. It has long been settled law that courts, like the market itself, must value property based on the uses to which it *could* be put, and may not zero out valuable property interests just because they are currently generating negative cashflow. If the rule were otherwise, undeveloped land would be valueless and *Lucas* a dead letter. And it has long been settled law that courts, like the market itself, must value property based on reasonable expectations about the regulatory climate, especially when those expectations are borne out in actual legislation. Yet the decision below—which will govern every takings claim against the federal government—ignores those principles, and wholly divorces judicial valuation from market valuation. The decision imperils all property nationwide that is not generating positive cashflows and creates pernicious incentives for the federal government to launder takings by combining value-enhancing regulatory changes with value-destroying takings. The Court should grant certiorari and bring the Federal Circuit—and the federal government's just compensation obligations—back in line with the market and the Constitution.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 889 F.3d 381 and reproduced at App.1-29. The Court of Federal Claims' opinions are reported at 97 Fed. Cl. 355 and 126 Fed. Cl. 389 and reproduced at App.32-325.

JURISDICTION

The Federal Circuit issued its opinion on May 7, 2018, and denied a petition for rehearing en banc on September 12, 2018. Chief Justice Roberts extended the time for filing a petition to February 11, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. The Wright Amendment Reform Act is reproduced at App.326-32.

STATEMENT OF THE CASE

A. Factual Background

1. Love Field and the Wright Amendment

Dallas Love Field Airport began as an army airfield used to train pilots during World War I. In 1917, the Dallas Chamber of Commerce bought the property and developed it into an industrial airfield, which it sold to the City of Dallas a decade later. A mere six miles from downtown, Love Field was well situated to serve as the city's municipal airport, which it proceeded to do for the next quarter century. App.157-58. Over the years, the city entered into

leases with various airlines under which the airlines were given exclusive rights to parcels of property out of which to operate and nonexclusive rights to use runways, taxiways, and other facilities.

Meanwhile, the nearby city of Fort Worth opened its own airport, which began competing with Love Field. In 1964, the federal Civil Aeronautics Board (the predecessor to the Department of Transportation (DOT)) deemed competition between the two airports harmful and ordered the cities to designate one airport to serve the area. The cities could not agree on which airport to close, so they compromised on building a new airport halfway between them, and Dallas-Fort Worth Airport (DFW) was born. App.158-59.

Eight of the carriers that serviced the two airports agreed to relocate to DFW. One, Southwest Airlines, did not. That holdout decision sparked litigation, with both Dallas and Fort Worth trying to freeze Southwest out of Love Field so that DFW would not face competition from an airport more convenient to downtown Dallas. But the cities lost, and Southwest was permitted to continue to operate out of Love Field. While the cities' hopes of consolidating all air service in DFW thus did not come to fruition, DFW nevertheless opened in 1974, with services operated by the eight other airlines. App.160-61.

Although Southwest prevailed in court, the cities and the airlines that operated out of DFW took their concerns about the competitive threat Love Field posed to a different forum. While Congress was generally in a deregulatory mood toward the airline industry in the late 1970s, *see* Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705, then-House

Majority Leader Jim Wright, the Congressman for Fort Worth, prevailed upon Congress to take a different approach toward Love Field. In an (ultimately successful) effort to lure American Airlines to move its headquarters to Fort Worth, Congressman Wright proposed prohibiting interstate flights to or from Love Field. App.160-61. That drastic proposal met with resistance, and Congress instead settled on a compromise dubbed the Wright Amendment.

The Wright Amendment generally prohibited interstate flights to or from Love Field, subject to a few exceptions, two of which are relevant here. First, flights to or from the four neighboring states (New Mexico, Oklahoma, Arkansas, and Louisiana) were permitted. Second, planes with a capacity of 56 or fewer passengers were permitted to fly to and from Love Field unconstrained by the neighboring-states restrictions. *See* An Act to Amend the Federal Aviation Act of 1958, Pub. L. 96-192, §29, 94 Stat. 35, 48-49 (1980). At the time, however, modern regional jets did not exist, and the 56-passenger restriction effectively precluded long-haul flights.

For the next few decades, Southwest successfully operated out of Love Field despite these restrictions, principally flying short-distance routes. In the 1990s, however, as a result of changes in technology and market dynamics, regional jets designed to hold fewer passengers while flying longer distances emerged. In 1996, Legend Airlines, Inc., decided to try to use Love Field to exploit the deep market for “first class” travel from Dallas to highly profitable locations like New York City and the District of Columbia, which could not be served by conventional carriers under the

Wright Amendment. To that end, Legend obtained the sublease to a 9.3-acre parcel of Love Field and sought approval from DOT to provide service to and from destinations beyond the neighboring states on standard-size planes that were *capable* of holding hundreds of passengers but had been specially configured to seat only 56. App.39. Competitors then complained that these specially configured planes did not satisfy the Wright Amendment's 56-passenger limit. But Congress stepped in and enacted the Shelby Amendment, which "clarified" that these larger planes did indeed comply with that requirement. *See* Pub. L. No. 105-66, §337, 111 Stat. 1425, 1447 (1997). Reflecting the pressure from consumers (as well as officials in other states) to ease the Wright Amendment's restrictions on service from the more convenient Love Field, the Shelby Amendment also expanded the list of approved destinations for planes with more than 56 seats to include Senator Shelby's home state of Alabama, as well as Kansas and Mississippi. App.39-40.

Southwest responded to the Shelby Amendment by expanding its Love Field flights to include Alabama and Mississippi. Legend responded by announcing plans to offer long-haul service using its reconfigured aircraft. And American, DFW's largest tenant, responded by suing the Department of Transportation to enjoin the Shelby Amendment. That suit, though ultimately unsuccessful, *see Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000), kept Legend from flying out of Love Field for the next two years. App.165.

2. Petitioners' Leasehold and Investment

While the Shelby Amendment litigation was pending, Legend began looking for a real estate investor interested in taking over the 9.3-acre sublease and developing the terminal out of which Legend hoped to fly. To that end, Legend turned to the Hampstead Group, a private equity firm with extensive experience in real estate investment that had turned profits for a list of institutional investors that included the endowments of Stanford, Yale, and Princeton, as well as Oregon's pension fund. Legend proposed that Hampstead take over its sublease and construct a state-of-the-art terminal out of which Legend could operate its luxury service. App.49-53.

Hampstead conducted extensive due diligence on the proposal, studying all of the available federal and state regulatory reports regarding Love Field, engaging one consulting firm to evaluate terminal rental rates and another to evaluate the demand for 56-seat aircraft, and carefully reviewing the due diligence that Legend had conducted before entering into its sublease. App.51-53. That due diligence reinforced the attractiveness of the investment. With the burgeoning market for longer-haul flights on regional jets with a 56-seat capacity, a terminal catering to that market would prove profitable even with the Wright Amendment's restrictions. Indeed, recent DOT rulings and reports suggested a huge demand for flights out of Love Field to destinations beyond the neighboring states. Hampstead thus calculated that even with the restrictions in place, its long-term revenues would far exceed the monthly

lease payments to the City. And while Legend would have the first right to offer flights out of the new terminal, Hampstead was confident that it could find other regional jet services to use the terminal if Legend proved unsuccessful. App.56-58.

Hampstead found the property particularly attractive because studies indicated that its value would skyrocket if the Wright Amendment's restrictions were further loosened or eliminated—a prospect Hampstead considered likely given the demand for greater competition and additional flights out of Love Field. App.119-21. Hampstead was "not alone in believing that the repeal would happen." App.122. Dallas "had the highest airfares in the nation" in the 1990s, largely due to lack of competition. App.120. As a result, "citizen groups … lobbied for the repeal of the Wright Amendment" throughout the 1990s, and Southwest was beginning to apply pressure too. App.123. A 1992 DOT study had "found that there would be tremendous benefit to consumers if the Wright Amendment was abolished, because of increased competition." App.118. And the Shelby Amendment demonstrated that loosening the restrictions was politically feasible. Hampstead thus was confident that repeal of the Wright Amendment was quite likely to occur during the decades-long sublease term.

After consulting with its investors, Hampstead moved forward with its plan. Hampstead set up a subsidiary, Love Terminal Partners, L.P., through which it acquired Legend's sublease in 1999. App.53-56. That sublease was part of a broader 26.8-acre segment of Love Field covered by a document known

as the Master Lease, which dated back nearly 50 years and allowed the property to be put to one—and only one—use: "aviation." App.43, 62.

3. The Lemmon Avenue Terminal

Hampstead completed its new terminal in early 2000 at a cost of $17 million. Located near the Lemmon Avenue side of the airport, the terminal had six gates and an adjacent parking garage, and was outfitted with state-of-the-art facilities designed to cater to the burgeoning luxury and regional jet markets. App.56.

Once the Fifth Circuit vindicated the Shelby Amendment, Legend began using the new terminal, operating flights during the second half of 2000. But while its flights were popular, Legend had difficulty raising its next round of capital, and by the end of the year it was forced into bankruptcy. That left the Lemmon Avenue Terminal with only Atlantic Southeast, an affiliate of Delta, as a tenant. But Atlantic Southeast's offerings were too small to justify the costs of keeping the terminal open, so Hampstead decided that the airline should move to the main terminal so Hampstead could focus on securing a new, larger tenant. App.58-59.

Meanwhile, that same year, the City of Dallas invited all airport stakeholders (including Hampstead) to develop a plan to overhaul Love Field. That plan envisioned Love Field as a 32-gate airport, with six gates at Hampstead's new terminal. The plan allowed for the possibility of expanding petitioners' terminal to include 10 more gates, which the property controlled by Hampstead could easily accommodate and which would have been extremely beneficial to

Hampstead. Implementation of the plan was delayed, however, after the terrorist attacks of September 11, 2001, plunged the air-travel industry into a recession. App.59.

That recession led most of the nation's largest airlines to file for bankruptcy over the next three years. *See* Int'l Air Transp. Ass'n, *The Impact of September 11 2001 on Aviation* (2011), https://bit.ly/2GzZ5mO. It also made finding a suitable tenant for the Lemmon Avenue Terminal a challenge. But Hampstead remained confident that the industry would recover and that the Wright Amendment eventually would be repealed. Hampstead thus continued to view its leasehold as a valuable asset with tremendous long-term potential, and thus continued to make monthly lease payments to the City and incur other carrying costs. Indeed, in late 2003, Hampstead engaged an architect to evaluate options for an additional terminal and parking structure, and then made the decision to increase its Love Field investment. Hampstead acquired the Master Lease for $6.5 million through a new subsidiary, Virginia Aerospace, LLC, thereby obtaining the rights to operate aviation services on the entire 26.8-acre leasehold. App.59-60.

4. The Five-Party Agreement and the Wright Amendment Reform Act

Consistent with Hampstead's predictions, in 2004, Southwest began an aggressive push to repeal the Wright Amendment. Its initial efforts achieved only modest success: Congress added Missouri to the list of Wright-Amendment-exempted states in 2004. But Southwest persisted, and within two years several

bills had been introduced to further relax the restrictions. App.169. Meanwhile, Hampstead persisted in its efforts to secure a large tenant. By April 2006, it was close to a deal with regional jet carrier Pinnacle Airlines (an affiliate of Northwest Airlines) that would have netted $100 million for the whole lease or $85 million for the gates. App.65-66.

Back in Washington, Congress decided that the Wright Amendment was a local problem in need of a local solution and urged Dallas and Fort Worth to work together to devise one. App.170. What emerged from those efforts was "the Five-Party Agreement."

As its name suggests, the Five-Party Agreement was an agreement reached by five parties: Dallas, Fort Worth, the DFW Airport Authority, American, and Southwest. App.5. Conspicuously absent from that list was a sixth interested party, Hampstead. The results, and their negative impact on Hampstead, were predictable. As Hampstead had anticipated, the agreement called for Congress to significantly loosen the restrictions on Love Field: The agreement resolved to petition Congress to expand the destinations to or from which flights could be offered, and to completely repeal the Wright Amendment after eight years. But those restrictions were to be loosened at the expense of the one key party not in the room: The compromise required Dallas to reduce the number of gates at Love Field from 32 to 20, and to do so by condemning and demolishing the Lemmon Avenue Terminal so that the "facility can never again be used for passenger service." App.6. In short, the agreement called for the complete elimination of the only economically viable use of the property Hampstead

had leased and the destruction of its newly built terminal.

The parties needed Congress to relax the federal restrictions on interstate air travel out of Love Field, which Congress did three months later by passing the Wright Amendment Reform Act (WARA), Pub. L. No. 109-352, 120 Stat. 2011 (2006). Consistent with the Five-Party Agreement, WARA required Dallas to "reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates." App.7. WARA also required Dallas to allocate those 20 gates "in accordance with [the] contractual rights and obligations existing as of the effective date of th[e] Act." App.7. And the Act forbade Dallas to take "any other actions" "inconsistent with" the Five-Party Agreement. App.274.

Although WARA precluded any aviation from the Lemmon Avenue Terminal—the only permissible economically viable use to which the leasehold could be put—Hampstead initially kept up its rent payments in hopes of being able to operate if it secured a court victory. Eventually, though, it told Dallas that it would no longer pay for a lease that WARA (and Dallas) had rendered useless. Dallas evicted petitioners, and then demolished the Lemmon Avenue Terminal in September 2009. App.8.

B. Procedural Background

This is the second of two suits about the Five-Party Agreement and WARA. The first was an antitrust case against the parties to the Five-Party Agreement. In that suit, the district court agreed with petitioners that the Five-Party Agreement "was put

together to eliminate competition and protect American and Southwest from competition against each other and other carriers, allowing them to preserve their dominant market shares and fare premiums." *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538, 545 (N.D. Tex. 2007). The court further concluded that "the Reform Act almost undoubtedly conflicts with the Sherman Act." *Id.* at 560. But the court concluded that the *Noerr-Pennington* doctrine shielded the defendants from antitrust liability. *Id.* at 548-61.

Petitioners then filed this suit in the Court of Federal Claims to recover just compensation from the federal government for WARA's destruction of all economic value in the Master Lease, as well as the demolition of the Lemmon Avenue Terminal. App.226-27.

1. The Court of Federal Claims

On summary judgment, Judge Sweeney agreed that WARA effected a physical taking by codifying Dallas' obligation to demolish petitioners' Terminal. App.268-324. She then held a trial on the remaining takings claims. The trial was extensive. It included a site visit to Love Field (before petitioners' terminal was demolished), expert testimony from nine witnesses, and thousands of pages of documents. Judge Sweeney's detailed factual findings span dozens of pages. App.36-67. Ultimately, she found a taking and ordered $133.5 million in just compensation.

Judge Sweeney first found that the Master Lease was a valid property interest that granted Hampstead the right to operate an aviation-related business out of Love Field. App.76-77. She then found that WARA

effected a categorical taking of that property interest under *Lucas*. App.78. In reaching those conclusions, Judge Sweeney evaluated testimony from both parties' experts. Petitioners' experts found that the lease had no economic value if (as WARA demanded) it could not be used as an air-travel terminal, and valued the Master Lease at between $133.5 and $152.1 million. App.138-46. The government's experts, by contrast, testified that the best use of the terminal was as a hangar, and that the property was unaffected by WARA. App.80-85.

Judge Sweeney found the government's experts unpersuasive, largely because they did not account for market demand and left several key assumptions wholly unsupported. App.88-96. By contrast, she credited petitioners' experts and found, consistent with the Master Lease's limitation to "aviation," that the highest and best use of the property was as a passenger airline terminal. App.94. Judge Sweeney accordingly concluded that WARA destroyed all economic value in the lease and effected a categorical taking under *Lucas*. App.94-112.

In the alternative, Judge Sweeney held that WARA effected a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). As to economic impact, she again found that the taking left the leasehold with no economic value, as the property could not be used for an air-travel terminal and no other use could be profitable. App.112-15. As to investment-backed expectations, Judge Sweeney found that petitioners reasonably believed that they could use the Master Lease for an air-travel terminal, and that the terminal would have

been profitable with or without the Wright Amendment. App.115-26.

Judge Sweeney found that petitioners reasonably anticipated that the Wright Amendment restrictions would be repealed (as they in fact were). In support of that finding, she pointed to an industry-wide movement to eliminate the Wright Amendment as early as 1987, and an industry-wide consensus that growing competitive pressures doomed the Wright Amendment. App.118 n.34. She credited the testimony of Hampstead's founder that he (like the rest of the market) believed repeal was imminent, as well as the testimony of petitioners' passenger-demand expert, who explained Southwest's push for repeal and how American was already preparing for that change. App.122-23. Finally, she cited Dallas' impact analysis of the repeal, plus the DOT study highlighting the benefits of repeal. App.124-25. After agreeing with the Texas district court that the law was designed to boost the five parties at the expense of petitioners, Judge Sweeney held that WARA effected a regulatory taking. App.126-30.

Consistent with the expert evidence, Judge Sweeney awarded $133.5 million in just compensation, calculating the value of petitioners' interest in the Master Lease and the terminal based on, among other things, their reasonable expectation that the Wright Amendment would be repealed. App.133-39, 147-54.

2. The Federal Circuit's Opinion

The Federal Circuit reversed, concluding that petitioners were entitled to nothing at all. The court acknowledged that WARA expressly "prevented use of

[petitioners'] property for commercial air passenger service—as had been permitted under the pre-WARA regulatory regime." App.15. The court agreed that petitioners "had a right under the leases to use their property for commercial air passenger service," and that "the only way to use the property for commercial air passenger service was to erect gates and lease those gates to airlines." App.11. And the court "assume[d]" that WARA "effectively barred [petitioners] from using the Lemmon Avenue Terminal for commercial air passenger service." App.12. The court nonetheless "conclude[d] that there was no regulatory taking." App.12.

The court did not dispute that petitioners' property was "valueless *after*" Congress passed WARA. App.16. Instead, the court held that destroying all value in petitioners' property had no "adverse economic impact" because the property—a leasehold interest in 26.8 acres of air-terminal land in which petitioners had invested tens of millions of dollars—was valueless *before* WARA was enacted. App.16-19.

In reaching that counterintuitive conclusion, the Federal Circuit did not reject any of Judge Sweeney's extensive factual findings. Nor did it point to any record evidence indicating that petitioners' leasehold was valueless under the Wright Amendment (because the government introduced none). Instead, the court zeroed in on a single data point: the use to which the property was being put at the time of the taking. Here, that was a nonuse; petitioners were content to wait for the right deal to come along, even if that strategy left them in the red (because monthly

payments under the lease exceeded incoming revenues) in the interim. According to the Federal Circuit, that was all that mattered. Because there was "no point during" petitioners' leasehold that petitioners' "revenue exceed[ed] [their] carrying costs," the court concluded that "there was no adverse economic impact," and hence "no taking." App.19.

The court further concluded that the repeal of the Wright Amendment, which the market anticipated and WARA actually accomplished, was irrelevant to the economic-impact analysis. Again, the court did not reject Judge Sweeney's finding that the market reasonably expected regulatory change, and that the fair market value of the property pre-WARA priced in the likelihood of that value-enhancing change. Instead, the court deemed that evidence irrelevant. According to the Federal Court, *this Court* "has rejected the theory that" property owners can have "reasonable, investment-backed expectations in the absence of a current regulatory regime." App.21. As a matter of law, then, the court declared petitioners' "reasonable, investment-backed expectations" "limited by the regulatory regime in place at the time they acquired the leases"—*i.e.*, the Wright Amendment. App.22.

The court reached that result by invoking *United States v. Miller*, 317 U.S. 369 (1943), and the "scope-of-the-project" rule. According to the Federal Circuit, *Miller* commands that "just compensation should not include any enhanced value attributable to the federal project for which the land was taken." App.24. Thus, the fact that Congress "liberalized" the restrictions of "the Wright Amendment," which obviously increased

the value of petitioners' property, was legally irrelevant because Congress coupled that value-enhancing regulatory change with a destruction of petitioners' ability to take advantage of the new regime as part of a single "project." App.24-25.

That left only the issue of the physical taking. Again, there was no dispute that a government actor had demolished petitioners' terminal. Nor was there any dispute that "WARA incorporates portions of the [Five-Party] Agreement," including Dallas' obligation to demolish petitioners' terminal. App.27. The court nonetheless held that Congress bore no responsibility for the demolition because WARA did not clearly incorporate, and Congress did not appropriate funds to support, that specific obligation. App.27-29.

REASONS FOR GRANTING THE PETITION

This should have been an easy case. Petitioners invested tens of millions of dollars in a leasehold at Love Field that the Court of Federal Claims valued at $133.5 million and that federal legislation rendered worthless. All the hallmarks of a taking were present. Not only did WARA render a massive, real-world investment worthless, but the government took the property at the precise moment regulatory changes made aviation property at Love Field more valuable. The timing was no accident. WARA was a product of a five-party agreement in which every interested party other than petitioners agreed to loosen restrictions on Love Field in exchange for reducing the number of flights from petitioners' terminal to zero. Then, to eliminate any lingering doubt that a taking was afoot, a federal statute codified an agreement to have petitioners' terminal destroyed. Yet the Federal

Circuit reviewed all that and concluded that nothing of value was taken.

That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The Federal Circuit reached that conclusion only by radically departing from settled takings law in (at least) two critical respects. First, the court concluded that taking property has no economic impact if the owner was not using the property to turn a profit at the time of the taking. Second, it concluded that reasonable, investment-backed expectations that regulatory restrictions will ease must be excluded in analyzing the economic impact of a taking, and that the analysis must instead focus *exclusively* on the value of the property under the regulatory scheme as it exists before the taking.

Each of those propositions is contradicted by decades of precedent from this Court and others. And each is fundamentally antithetical to the very concept of fair market value, which turns on how property is valued in the real world. The conflict with this Court's seminal decision in *Lucas* is particularly stark. *Lucas* involved two undeveloped lots, which by their nature involved carrying costs like real estate taxes. Under the Federal Circuit's reasoning, there was no *Lucas* taking in *Lucas* itself, because the undeveloped lots were not generating a profit before the state rendered them valueless.

The consequences of the decision below are extreme. Any vacant building, undeveloped land, or underperforming leasehold anywhere in the nation is open for an uncompensated *Lucas* taking because the only forum that hears such claims will view the

property as valueless even before the taking. That may sound extreme, but it is precisely what happened here. The Court of Federal Claims made extensive factual findings, including that the effect of WARA was to render petitioners' property valueless. The Federal Circuit left that conclusion undisturbed but held that the property was valueless *even before WARA* because it generated a negative cashflow. Never mind the tens of millions petitioners invested, and never mind that petitioners' experts and the Court of Federal Claims valued the property at $133.5 million. In short, the decision below embraces a dangerous proposition that is antithetical to *Lucas* and the whole thrust of the Takings Clause.

I. The Federal Circuit's Novel Rule That Nothing Of Value Is Taken If The Property Is Not Turning A Profit At The Time Of The Taking Is A Radical Departure From Settled Precedent.

1. It is black-letter law that the just compensation due under the Takings Clause is the fair market value of property when it is taken. *See, e.g.*, *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984). And both in the real world and in court, fair market value is a function not only of the use to which property was being put when it was taken, but of "the prospect of demand for" "profitable use[s]" to which the property could be put. *Olson v. United States*, 292 U.S. 246, 255 (1934). A gold bar used as a paperweight is valued as a gold bar, not just as a paperweight.

That principle makes eminent sense. The Takings Clause requires that a party whose property is taken for public use be put "in the same position

monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973). Absent the government condemnation, the party would not be constrained to continue to use her property in any particular way, but could sell it on the market, which values property not based on any temporary or idiosyncratic use but on all the possible uses to which it could be employed. Thus, rather than allow valuations to turn on the owner's subjective views or particular uses, this Court has instructed courts to apply the objective "concept of fair market value to determine the condemnee's loss." *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys.*, 441 U.S. 506, 511 (1979). Under that objective standard, a property owner is entitled to receive as just compensation "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Miller*, 317 U.S. at 374.

To state the obvious, that objective measure does not focus only on the current owner's particular use, which could skew the valuation in dramatic ways. The most obvious example is undeveloped real estate that is being held for investment or future use. There are always carrying costs for the property, such as real estate taxes and financing, which means that until the property is developed, the monthly cashflow associated with the property is negative. But that hardly renders the property worthless. Conversely, someone may value a plot for sentimental reasons or use their unique skills to generate profits that no other owner could replicate. The Constitution does not require the government to compensate for such idiosyncratic valuations. Rather, the government

must compensate property owners based on the objective market value that accounts for all the ways the property could be used.

That principle is particularly important for long-term leaseholds and in changing regulatory environments. As any landlord can attest, it can often make more sense to turn down the short-term cashflow of a temporary tenant to ensure that the property is available for a tenant willing to pay a higher rent or enter a longer-term agreement. Similarly, a property owner may rationally not maximize short-term income if regulatory changes might allow a more profitable use in the near future. Market valuations can take account of all these factors, and underscore that a vacant unit or undeveloped plot is hardly worthless.

Unsurprisingly, that commonsense principle is borne out by this Court's cases. *Lucas* itself involved two lots that were undeveloped when South Carolina passed the Beachfront Management Act. 505 U.S. at 1007. The owner no doubt had real estate taxes and other carrying costs associated with the lots. Yet when South Carolina passed a statute that "bar[red] petitioner from erecting any permanent habitable structures on his two parcels," this Court did not simply shrug because the lots were not generating income at the time. *Id.* To the contrary, this Court held that the property had substantial value even though it was lying fallow, because the market valued it based on the uses to which it *could* have been put. *See id.* at 1022-27. The Court further held that compensation was owed based on that market value, even though the property was just as undeveloped

after the taking as before. *Id.* at 1030. If the state's compensation obligation had turned on whether Lucas was putting the property to valuable use before the taking, then *Lucas* would have come out the other way.

2. The decision below cannot be reconciled with *Lucas* or the bedrock principle that a property's value is not dictated by its current use or nonuse. The Court of Federal Claims applied the law correctly and made express findings that petitioners' property was highly valuable even with the Wright Amendment's restrictions in place, both because of the possibility of profitable regional jet flights and because the market believed further easing of those restrictions was likely. Those findings are borne out not just by the extensive record, but by common sense. Petitioners are highly sophisticated investors. The notion that they invested tens of millions of dollars in obtaining and improving property that was literally *worthless* is fantastical. So is the notion that a sophisticated, publicly held airline like Pinnacle would pay $100 million for the right to fly regional jets out of Love Field if that right were worthless.

To be sure, petitioners had not yet turned a profit on the Lemmon Avenue Terminal when WARA became law. But that was a product of conscious strategic decisions and temporary market conditions. The post-9/11 recession created unique challenges, but not ones that rendered petitioners' investment worthless. To the contrary, petitioners actually expanded their investment in 2003, which they were able to do because their financial position allowed them to withstand short-term losses while waiting for

an attractive long-term opportunity for their terminal. App.59, 64-66. That strategy was on the verge of coming to fruition when WARA rendered their valuable aviation property worthless.

The Federal Circuit did not dispute any of these factual findings. Instead, it embraced a categorical rule that because petitioners had not yet entered into an airline deal in which their revenue exceeded their "carrying costs," a regulation that deprived their property of all economic value going forward had "no adverse economic impact." App.19. In the Federal Circuit's myopic view, notwithstanding petitioners' substantial investment and near-consummation of a $100 million sale, the federal government essentially did petitioners a favor by wiping out their investment, since they had a negative cashflow associated with the property before the taking.

As noted, that conclusion is flatly contrary to *Lucas*. Indeed, if that were the law, then the property owner in *Lucas* would have owed South Carolina a thank you note, rather than South Carolina owing Lucas just compensation for rendering his property valueless. By turning current (non)use into an irrebuttable presumption that the economic impact of a taking is zero, the Federal Circuit turned *Lucas* on its head and jettisoned decades of bedrock takings principles along with it.

3. The Federal Circuit's decision conflicts not only with this Court's cases, but with decisions from other courts recognizing that present (non)use alone does not determine the value of property. *United States v. 69.1 Acres of Land, More or Less, Situated in Platt Springs Township*, 942 F.2d 290 (4th Cir. 1991), is

instructive. That case involved the taking of undeveloped land that the owner valued at $450,000, positing a future use of sand mining. *Id.* at 291-92. The government argued that this potential future use should not count for purposes of valuing the property. *Id.* at 293-94. The Fourth Circuit disagreed. Although the court acknowledged that land "may not be valued on the basis of conjectural future demand," it found the owner's "objective and convincing evidence" that there was a market for sand mining on the site sufficient to support incorporating that potential use into fair market value, rather than limiting the economic-impact analysis to the property's (non)use at the time of the taking. *Id.* at 293-94.

The Fifth Circuit, where the land at issue here lies, applied the same reasoning in *United States v. 8.41 Acres of Land, More or Less, Situated in Orange County*, 680 F.2d 388 (1982). There, the court began with the settled principle that property owners bear the burden of proving fair market value. *Id.* at 394. The court then concluded that the fair market value of the land incorporated not just the relatively economically unproductive pastoral use to which it was put at the time of the taking, but also its potential use as an industrial plant. *Id.* at 395. Likewise, in *United States ex rel. TVA v. 1.72 Acres of Land in Tenn.*, 821 F.3d 742 (6th Cir. 2016), the Sixth Circuit applied the rule that the value of condemned land includes not just its present use, but reasonably likely alternative uses. *Id.* at 754-56.

The decision below, by contrast, held that a taking cannot have *any* "adverse economic impact" unless the property is being used to generate revenue at the time

of the taking. App.19. Accordingly, while states remain obligated to pay just compensation based on what a willing buyer would *actually* pay for the property—a measure that necessarily takes into account profitable uses to which the property *could* be put—the federal government alone can escape its takings obligations whenever it targets property generating a negative cashflow, which describes every undeveloped plot of land in the nation. That result squarely conflicts with this Court's cases, decades of lower court cases, and how the market actually values property.

II. The Federal Circuit's Novel Rule That Anticipated Regulatory Changes Are Irrelevant To Fair Market Value Is Equally Divorced From Settled Precedent.

The Federal Circuit exacerbated its error by embracing a novel rule that the economic impact of a taking not only must be judged by the property's current use, but also must be judged based on the value of the property under the current regulatory regime, even when the regulatory environment is in flux and the market believes that value-enhancing changes are likely. That rule is contrary to common sense, market valuation, and this Court's cases even in a normal case. But here, the Federal Circuit applied this mistaken rule when value-enhancing regulatory changes were not only likely and anticipated by the market, but actually introduced by the same legislation that effected the taking. The Federal Circuit's misguided view allowed it to ignore the undeniable reality that WARA relaxed the restrictions on Love Field (which enhanced the value

of Love Field) only by wiping out petitioners' leasehold and excluding them from the market entirely. If the value-enhancing aspects of WARA had preceded the property-destroying aspects of WARA by even a day, the Federal Circuit would have recognized a massive taking. Congress cannot be allowed to shield such a massive taking via the mistaken decision below.

1. Just as fair market value necessarily takes into account uses to which property reasonably *could* be put, it necessarily takes into account reasonable expectations of regulatory change. Both principles flow directly from the rule that just compensation is measured by "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Miller*, 317 U.S. at 374. In the real world, it is commonplace for a willing buyer to take into account reasonably expected changes in the regulatory climate when valuing property. That is particularly true of property with commercial uses. The market would place a higher value on the parcel in the Fourth Circuit sand-mining case if it anticipates that sand-mining will be unrestricted, and a lower value if it anticipates output restrictions. The Takings Clause necessarily follows suit, as it looks to fair market value as an objective measure of value; indeed, the whole point of the clause is to put the property owner "in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers*, 409 U.S. at 473-74.

To be sure, "a mere unilateral expectation … is not a property interest entitled to protection," any more than an idiosyncratic use or subjective valuation carries the day. *Webb's Fabulous Pharmacies, Inc. v.*

Beckwith, 449 U.S. 155, 161 (1980). But the reasonable expectation of *the market* is not "a mere unilateral expectation." And the market reasonably anticipates legal changes and adjusts value accordingly all the time. To ignore the regulatory climate, and the possibility that it could change for the better or the worse, in valuing a property intended for natural gas production or use as an airport would be to ignore critical aspects necessary for an accurate valuation. The markets would never ignore such an important component of value, and the law outside the Federal Circuit does not ignore it either.

To the contrary, lower courts routinely have recognized that reasonably expected changes in a regulatory climate can and should be taken into account in determining fair market value. As the First Circuit put it, if "the property owner [can] show that it is reasonably probable that the relevant restrictions will be removed in the reasonably near future," then fair market value must take that anticipated increase in value into account. *United States v. 33.92356 Acres of Land*, 585 F.3d 1, 7 (1st Cir. 2009); *see also, e.g.*, *United States v. 174.12 Acres of Land, More or Less, in Pierce Cty.*, 671 F.2d 313, 316 (9th Cir. 1982) (same).

2. The Court of Federal Claims found that petitioners—like the rest of the market—reasonably "believed that the Wright Amendment would be repealed." App.59. The court likewise found "that the property had value … under a regime in which the Wright Amendment was repealed or modified." App.17-18. The Federal Circuit did not dispute either of those findings; nor could it given that petitioners' expectation of regulatory change came to pass in the

very statute that wiped out their investment. Yet the Federal Circuit nonetheless declared petitioners' and the market's reasonable expectation of regulatory change legally irrelevant to the economic-impact inquiry. According to the Federal Circuit, economic impact must be measured *solely* by "the regulatory regime in existence" when the property was acquired. App.21. The court thus held that neither the expected moderation of a regulation nor its actual repeal can factor into determining the economic impact of a taking *as a matter of law* even where, as here, the finder of fact found that the change was widely anticipated.

The Federal Circuit seemed to think that rule was compelled by this Court's decision in *Miller* and the "scope of the project" rule, but *Miller* says nothing of the sort. *Miller* stands for the proposition that "the increment of fair market value represented by knowledge of the Government's plan to construct the project for which the land was taken" should not be included "within the constitutional definition of 'just compensation.'" *United States v. Fuller*, 409 U.S. 488, 491 (1973). That proposition has no bearing here (or in any *Lucas* taking), as this is not a case in which expectation of an imminent taking caused the property to increase in value. To the contrary, petitioners' complaint (as with any alleged *Lucas* taking) was that the takings effectuated by WARA *destroyed* the value of their property. At the same time, different provisions of the same statute relaxed restrictions on Love Field as the market had anticipated in ways that, but for the taking, would have rendered petitioners' aviation leasehold even more valuable. To ignore both the market's

expectation that those restrictions would be lifted and the fact that WARA did just that is to ignore an important aspect of valuation and to systematically undercompensate property owners.

The Federal Circuit's error also led it to ignore the massive unfairness inflicted by WARA. By taking petitioners' property in the same breath that it enhanced the value of other interests at Love Field, WARA committed the classic sin of takings: It inflicted costs on petitioners alone that should be borne by society as a whole. Rather than recognize the supreme unfairness of a statute that benefitted the five parties in the negotiating room at petitioners' expense, the Federal Circuit allowed a value-enhancing regulatory change to shield a value-destroying taking from being recognized as such. Even the Federal Circuit would have recognized that if Congress had first eased the restrictions at Love Field and then wiped out petitioners' property interests a few days later, Congress would have effectuated a massive taking. But combining the two steps into one does not launder the taking or otherwise get Congress off the hook.

Here, the market correctly anticipated that the restrictions on Love Field were unsustainable. They had no analog at other airports, they suppressed competition in a valuable market, and they harmed consumers by artificially limiting the usefulness of the airport most convenient for millions of Dallas residents. The best that could be said for the restrictions is that they could be justified as a temporary measure to drive consumers to DFW

during its first years of operation. But the market perceived that the restrictions would not last.

WARA proved both the market and petitioners prescient about the unsustainability of the restrictions. And subsequent events validated petitioners' view at the time of their investment that lifting the restrictions would magnify the value of aviation property at Love Field. In 2014, Southwest paid $120 million to acquire the lease rights to two of the 20 gates at Love Field. And by 2015, Delta reported that it had "gained around $230 million in revenue a year from customers who shifted from flying out of [DFW] to Love Field." Sheryl Jean, *Delta cites potential losses if it loses rights at Dallas Love Field*, Dallas News (Sept. 29, 2015), https://bit.ly/2WMzQ6m. By all rights, petitioners should have shared in that enhanced value of aviation property at Love Field. Allowing petitioners to be deprived of all economic value and all claim to compensation based on the fact that WARA took their property at the precise moment it benefitted all others with aviation-property interests at Love Field makes no sense and has no grounding in this Court's precedents. It is a fundamentally misguided extension of the scope-of-the-project rule that creates perverse incentives for Congress to pay nothing for taking more valuable property and to play favorites by benefitting some, while foreclosing others from the market altogether.

III. The Decision Below Has Far-Reaching Consequences For Property Owners.

The decision below conflicts with the decisions of this Court and others, departs from bedrock principles

of just compensation, and entrenches the Federal Circuit's persistent watering down of the Takings Clause. It does all that in a manner that distorts the rights of property owners and the workings of the market. Yet it manages to do so in a way that cleanly presents the questions presented, as the Federal Circuit did not reject any of the lower court's factual findings. The Federal Circuit accepted that WARA rendered petitioners' massive investment without value, and yet found no taking at all based on a mistaken approach to measuring economic impact. This case thus presents an excellent vehicle for resolving issues that go the heart of the Constitution's protections of private property.

This case is just the latest example of the Federal Circuit's dim view of the Takings Clause. *See* James S. Burling, *Ten Years After—The Roberts Court and Property Rights*, SX015 ALI-CLE 915 (2016). Because the Federal Circuit hears all federal takings claims, its pronouncement sets the takings law for Congress and the federal government nationwide. Absent this Court's intervention, then, the Federal Circuit's decision will control each time the United States takes private property for public use. Yet the decision below allows the federal government to deprive private property of all value without consequence or compensation any time the property owner is not presently using the property to turn a profit. As virtually all undeveloped land has carrying costs and negative cashflows, the decision below clears the way for a *Lucas* taking of every undeveloped lot or temporarily underperforming leasehold in the land.

If that were all the decision below accomplished, it would more than merit plenary review. But the attack on sensible measurements of the impact of a taking did not end there. By declaring that courts cannot look beyond current use and the current regulatory environment in determining the economic impact of a taking, the decision below systematically undervalues property interests and creates all manners of perverse incentives for Congress.

Worse still, each of these rules considerably undercuts the ability of private parties to make prudent investments with the security that their investments will not be wiped out by the federal government. Property values reflect myriad prospective uses and the market's best assessment of the regulatory climates. And many investors 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. The decision below threatens all of that. By treating property with a negative cashflow as worthless, the decision creates the potential that long-term investors will lose their investment entirely if the federal government renders their property worthless before they can turn a positive cashflow. Investors also face the prospect that good money spent on property reflecting the market's assessment of the regulatory environment will be deemed valueless by judicial rules that artificially ignore the prospects for regulatory change. That is no hypothetical. Petitioners invested tens of millions of dollars in a leasehold that the market recognized as having substantial value and that the Court of Federal Claims valued at over $133.5 million.

The Federal Circuit zeroed out that investment entirely based on its mistaken legal rules.

The government-friendly standard embraced below also lends itself to abuse by states, local governments, and private parties. Indeed, while the law of the Fifth Circuit where Love Field is located would have required a local government to compensate such a taking, the decision below all but demands that rent-seekers make their way to Washington. Moreover, by allowing Congress to evade review by combining value-destroying taking with value-enhancing regulatory changes, the decision below creates dangerous precedents for Congress. The only thing better than a relaxation of the kind of regulatory restrictions that hindered the value of Love Field is a relaxation where all the benefits go to some parties at the expense of others who were not in the room when the deal was struck.

Once again, this is not a hypothetical. Southwest wanted the restrictions on Love Field lifted, American wanted to limit flights out of Love Field, and they both could get what they wanted if the number of flights out of petitioners' terminal was exactly zero. If such a deal can be struck here and embodied in a federal statute without a dollar of compensation, it will not be the last time parties come to Congress to bless a similar deal.

Finally, the decision below eviscerates *Lucas* as a constraint on the federal government. The hard part of bringing a *Lucas* claim is showing that the government regulation *left* the property owner with nothing of value. But the decision below makes it all but impossible to show that the property owner *started*

with anything of value, because a negative cashflow is fatal and the prospect that the regulatory environment might improve cannot be considered. *Lucas* is too important a decision and too important a protection for property owners to be rendered a dead letter in the circuit that hears every nontrivial takings claim against the federal government.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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