No. 18-1062

In the Supreme Court of the United States

LOVE TERMINAL PARTNERS, L.P., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in assessing the economic impact of government action alleged to constitute a taking based on the record evidence of the investment's financial history under the regulatory restrictions that existed at the time of the alleged taking.

2. Whether the court of appeals erred in determining that petitioners lacked reasonable, investment-backed expectations premised on their speculation about potential changes to federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is published at 889 F.3d 378. The opinions of the Court of Federal Claims (Pet. App. 32-325) are published at 97 Fed. Cl. 355 and 126 Fed. Cl. 389.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2018. A petition for rehearing was denied on September 12, 2018 (Pet. App. 30-31). On December 17, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2019, and the petition was filed on February 11, 2019 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the development of Love Field, an airport located in and owned by the City of Dallas.

Pet. App. 2. In 1955, Dallas entered into a long-term lease with Braniff Airways for a portion of Love Field. *Id.* at 2-3. Throughout the 1960s, Love Field was the only airport in Dallas, and it competed with Greater Southwest International Airport in Fort Worth. *Id.* at 37. In 1964, the Civil Aeronautics Board (the predecessor to the U.S. Department of Transportation with respect to the economic regulation of airlines and airports) determined that the competition between the two airports was harmful and ordered the cities to designate a single airport to handle Board-regulated air carriers. *Ibid.*

Dallas and Fort Worth agreed to construct a new airport—Dallas/Fort Worth International Airport (DFW)—to be located between the two cities. Pet. App. 37-38. In 1968, Dallas and Fort Worth adopted a bond ordinance providing that both cities would work to phase out Love Field and transfer services to DFW. *Id.* at 37. In 1970, eight air carriers that then serviced the Dallas and Fort Worth communities agreed to move their operations to DFW. *Id.* at 37, 159.

Southwest Airlines declined to move its operations to DFW, however, and started to provide intrastate flights from Love Field in 1971. Pet. App. 37-38. The Texas Aeronautics Commission authorized Southwest's service, which did not require federal certification because the airline flew only within Texas. *Id.* at 159-160. Dallas and Fort Worth unsuccessfully sought to block Southwest's plans to continue operating out of Love Field. *Id.* at 38.

In 1978, Congress enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. See Pet. App. 38. Southwest "viewed deregulation as an opportunity to become an interstate air carrier." S. Rep. No.

317, 109th Cong., 2d Sess. 2 (2006) (Senate Report); see Pet. App. 161. Southwest applied to the Civil Aeronautics Board for approval to provide service from Love Field to New Orleans. Pet. App. 161. The Board granted the application over the objections of DFW and American Airlines. *Ibid.*

In 1980, Congress enacted what became known as the "Wright Amendment" to restrict flights from Love Field. See International Air Transportation Act of 1979 (Wright Amendment), Pub. L. No. 96-192, § 29, 94 Stat. 48-49; Pet. App. 3. The Wright Amendment permitted commercial flights between Love Field and destinations within Texas and its four bordering States. § 29(c), 94 Stat. 48-49. The Wright Amendment restricted flights between Love Field and other destinations in the United States to airplanes with 56 or fewer seats. § 29(a), 94 Stat. 48. Southwest continued its operations out of Love Field consistent with the limitations of the Wright Amendment. Pet. App. 5, 40.

In the late 1990s, nearly 20 years after the Wright Amendment was enacted, the Hampstead Group, a Dallas private-equity group that controls petitioners, began exploring the possibility of investing in Love Field in cooperation with Legend Airlines. Pet. App. 3, 36, 50-53. Legend intended to provide interstate service to and from Love Field using larger planes that had been retrofitted to have 56 first-class seats. *Id.* at 3-4, 39-40, 52. Legend petitioned the Department of Transportation to operate under the 56-seat exception in the Wright Amendment, but the Department determined that the exception applied only to aircraft that had been originally configured to hold 56 passengers or fewer. *Id.* at 39 (citing Senate Report 3).

Following that determination, Congress enacted what became known as the "Shelby Amendment," which provided that retrofitted airplanes were permissible under the Wright Amendment's 56-seat exception. Department of Transportation and Related Appropriations Act of 1998 (Shelby Amendment), Pub. L. No. 105-66, § 337, 111 Stat. 1447. The Shelby Amendment also expanded the Love Field service area for planes with more than 56 seats to three additional states—Alabama, Kansas, and Mississippi. *Ibid.*; see Pet. App. 39-40. A later amendment added Missouri to the list of States exempted from the Wright Amendment's restrictions. Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 181, 119 Stat. 2430; Pet. App. 3, 5.

In 1999, petitioner Love Terminal Partners, L.P., acquired a sublease from Braniff for 9.3 acres of property at Love Field. Pet. App. 3. The subleased land was near Lemmon Avenue, separate from the main terminal. *Id.* at 2-4. In 2000, petitioners completed construction of a six-gate terminal, known as the Lemmon Avenue Terminal, and a parking garage on the subleased land. *Id.* at 3-4. In 2003, petitioner Virginia Aerospace, LLC, acquired the remainder of Braniff's lease. *Id.* at 4.

The basic premise of petitioners' investment, as articulated in a formal Business Plan shared with investors, was to exploit the existing restrictions imposed by the Wright Amendment—including the 56-seat exception—to profit from Legend Airlines. Pet. App. 20 n.4. In the Business Plan and an accompanying letter to investors, petitioners laid out an "upside" case and a "downside" case for the investment. *Ibid.*; C.A. App. 361-368,

2638-2663. The upside case hinged on Legend's success: if Legend succeeded, petitioners would convert the investment in the terminal into stock in Legend and would own 62.7% of the airline. C.A. App. 2638-2641, 2648-2652. Petitioners anticipated that the combined value of the airline and the terminal would be nearly $360 million, or about six times what petitioners had invested. *Id.* at 2640, 2649-2652. The downside case was premised on the use of the Legend Terminal by other airlines in the event that Legend failed. *Id.* at 2638-2639. Under that scenario, petitioners anticipated net operating income of $5.7 million for the terminal and two parking garages, based on revenue of $5 million from the terminal, and $5.1 million from parking. *Id.* at 2640, 2651.

In April 2000, Legend began operating flights from the Lemmon Avenue Terminal, offering passenger service to Las Vegas, Los Angeles, New York City, and Washington Dulles Airport. Pet. App. 167; C.A. App. 466-467. Legend used gates at the terminal under a license agreement but never paid any rent to petitioners. Pet. App. 55; C.A. App. 187-188, 553, 5029-5032. In December 2000, Legend entered bankruptcy proceedings and stopped flying. Pet. App. 4. Legend never again offered scheduled passenger service. *Id.* at 58.

In addition to Legend, Atlantic Southeast Airlines briefly used the Lemmon Avenue terminal between July 2000 and May 2001, when it moved to Love Field's main terminal. Pet. App. 4. No commercial airline offered scheduled passenger service from the Lemmon Avenue terminal after that time, despite petitioners' efforts to market the terminal to other potential users. *Id.* at 4, 58-60, 65-66, 168-169.

On July 11, 2006, Dallas, Fort Worth, Southwest Airlines, American Airlines, and the DFW Airport Board signed a document concerning Love Field known as the "Five-Party Agreement." Pet. App. 5-7. In that agreement, the parties obligated themselves to seek the repeal of the Wright Amendment within eight years; to ease through-ticketing from Love Field immediately (*i.e.*, to allow airlines to offer tickets between Love Field and any destination, so long as the flight stopped in a State authorized by the Wright Amendment); and to reduce the number of gates available for passenger air service at Love Field from the existing total of 32 gates to a maximum of 20. *Id.* at 5-6. The parties also agreed to an allocation of those gates among specific airlines. *Id.* at 6. Dallas agreed to "acquire all or a portion of the lease on the Lemmon Avenue facility, up to and including condemnation, necessary to fulfill its obligations under this Contract." *Ibid.* (quoting C.A. App. 3092). Dallas also agreed to the "demolition of the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease [by Dallas] to ensure that that facility can never again be used for passenger service." *Ibid.* (quoting C.A. App. 3092).

In October 2006, Congress enacted the Wright Amendment Reform Act of 2006 (WARA), Pub. L. No. 109-352, 120 Stat. 2011 (Pet. App. 326-332). WARA provided for the repeal of the Wright Amendment in eight years. § 2(b), 120 Stat. 2011. In the interim, WARA expanded through-ticketing to and from Love Field, allowing carriers to issue tickets for travel that started or ended at Love Field so long as the traveler stopped at an airport in an approved State. § 2(a), 120 Stat. 2011. WARA also addressed the number of gates at Love Field, requiring Dallas to reduce the number of gates

available for passenger air service at Love Field to 20 as soon as practicable. § 5(a), 120 Stat. 2012. WARA did not specify the location of those 20 gates, which could have been at either the main terminal or at the Lemmon Avenue Terminal. WARA specifically provided that no federal funds could be used to remove gates at the Lemmon Avenue Terminal. § 5(a)-(b), 120 Stat. 2012.

In April 2008, eight years after the last flights had operated out of the Lemmon Avenue Terminal, petitioner Virginia Aerospace stopped paying rent to Dallas on the lease. Pet. App. 8. Dallas then instituted eviction proceedings and regained possession of the Lemmon Avenue Terminal. *Ibid.* In 2009, Dallas demolished the Lemmon Avenue Terminal. *Ibid.*

2. In 2008, petitioners filed this suit alleging that WARA effected a regulatory taking of petitioners' leases with Dallas and a physical taking of the Lemmon Avenue Terminal. Pet. App. 8.

a. The Court of Federal Claims granted in part petitioners' motion for summary judgment, concluding that WARA effected a physical taking of the Lemmon Avenue Terminal. Pet. App. 8, 156-325. After trial, the court held the United States liable for a regulatory taking of petitioners' leases. *Id.* at 8-9, 32-155.

b. The Federal Circuit reversed. As to petitioners' regulatory-takings claim, the court of appeals "assume[d], without deciding," that petitioners had correctly characterized WARA as "effectively barr[ing] [petitioners] from using the Lemmon Avenue Terminal for commercial air passenger service." Pet. App. 12. To establish that WARA thereby effected a taking, the court reasoned, petitioners were required to show that the "government action significantly diminished the value of [their] property," as "[t]here cannot be a regulatory

taking in the absence of economic injury" that is "caused by the government action at issue, not by some other factor." *Id.* at 15-16. The court concluded that petitioners had not established that they experienced an economic injury because they did not "demonstrate[], or even attempt[] to demonstrate, that their ability to use their property for commercial air passenger service under the pre-WARA regulatory regime had any value." *Id.* at 17.

The court of appeals explained that petitioners had offered evidence about the value of the leases not under the Wright Amendment, but rather "under a regime in which the Wright Amendment was repealed or modified." Pet. App. 17-18. "None of [petitioners'] experts assessed the use or value of [petitioners'] leaseholds with the Wright Amendment in effect—despite the fact that the Wright Amendment was the governing law at the time of the alleged taking and had been for over a quarter century before then." *Id.* at 18. Instead, petitioners offered testimony that valued their leases on the assumption that Congress would repeal the Wright Amendment. *Ibid.* Because petitioners presented "no * * * testimony" that "their property had value in the regulatory environment that existed before the government action, and that this value was diminished by the government action that prevented them from operating under the existing regime," the court of appeals rejected their takings claim. *Ibid.*

The court of appeals further concluded that there was no record evidence indicating that petitioners could have established that WARA diminished the value of their leases under the existing regulatory regime if they had sought to make such a showing. Pet. App. 18. The

court observed that the "historical financial performance [of the leases] suggests that [petitioners'] property was *not* valuable for air passenger service with the Wright Amendment in place." *Ibid.* The court relied on the evidence that Legend went bankrupt in 2000, eight months after beginning operations; the only other airline to use the Lemmon Avenue Terminal moved out a few months later; and petitioners had not received any other offers for use of the terminal despite trying "to market their property to other airlines." *Id.* at 19. "[B]y the time of WARA's enactment," the court observed, "no airline had used the Lemmon Avenue Terminal or paid any rent to [petitioners] for more than five years," and petitioners had suffered "a net income loss of roughly $13 million" from the time they acquired the sublease in 1999 to the enactment of WARA in 2006. *Ibid.* Based on the evidence petitioners had offered, the court concluded that they had failed to establish that WARA produced an "adverse economic impact." *Ibid.*

The court of appeals also rejected petitioners' argument that their leases should have been valued as if the Wright Amendment did not exist because "at the time they acquired the leases in 1999 and 2003, [they] had a reasonable, investment-backed expectation in the outright repeal of the Wright Amendment." Pet. App. 19. First, "[a]s a factual matter," the court questioned whether petitioners actually "had such an expectation at the time they acquired the leases." *Id.* at 20. The court cited evidence that, far from anticipating the Wright Amendment's repeal, petitioners "specifically intended to operate within—and even take advantage of—the Wright Amendment's plane size and destination restrictions." *Id.* at 20 n.4.

Second, the court of appeals stated that, to the extent petitioners expected the Wright Amendment to be repealed, that expectation was too "speculative" to be reasonable. Pet. App. 20 & n.5. The court noted that when petitioners acquired their leases, "[t]he Wright Amendment had been in effect for two decades" and "the only legislative movement towards total repeal" during that time was a bill "on which no action was ever taken." *Id.* at 20 n.5. Although petitioners "point[ed] to a 1992 Department of Transportation study" stating that repealing the Wright Amendment would benefit consumers, "this study came seven years before [petitioners'] investment and in no way suggested that repeal was imminent." *Ibid.* And while the Shelby Amendment had "relaxed the Wright Amendment's restrictions," the Shelby Amendment "fell far short of the kind of deregulation that would allow [petitioners] to operate a terminal with nationwide flights on large planes." *Ibid.* Rather, the court explained, "concrete proposals to modify the Wright Amendment did not become significant until 2004, after [petitioners] had acquired the property." *Ibid.*

Even putting those issues aside, the court of appeals concluded that petitioners' purported reliance on an anticipated repeal of the Wright Amendment was "unsound." Pet. App. 20. The court explained that the reasonable investment-backed expectations analysis "is not designed to protect private predictions of regulatory change," but rather to "account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted." *Id.* at 20-21 (citing *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1350 n.22

(Fed. Cir. 2001) (en banc), cert. denied, 535 U.S. 1096 (2002)). The court concluded that petitioners' expectations were "limited by the regulatory regime in place at the time they acquired the leases, which included the Wright Amendment," and that their failure to establish any reasonable investment-backed expectations provided an additional reason to reject their takings claim. *Id.* at 22.

In reaching that conclusion, the court of appeals observed that "[i]t is undoubtedly true that, when assessing the economic impact of a particular government action alleged to constitute a taking, a court can consider the extent to which other, unrelated, reasonably probable zoning or regulatory changes may have influenced the property's fair market value." Pet. App. 23. But the court stated that this principle did not support petitioners' claim because the condemnation cases petitioners relied upon themselves "emphasize that [petitioners] cannot seek compensation for economic value attributable to the project for which the property was taken." *Id.* at 24. The court accordingly rejected petitioners' contention that "they deserve compensation because WARA's deregulatory aspects would have made their property more valuable—if only it had not restricted use of the property for commercial air passenger service." *Id.* at 25.

Finally, the court of appeals held that WARA did not effect a physical taking. Pet. App. 26-29. The court observed that WARA did not "incorporate Dallas' commitment to 'demolish the gates at the Lemmon Avenue facility'" and instead "distance[d] the federal government from Dallas' intended action" by providing that "federal funds not be used for removal of Lemmon Avenue gates." *Id.* at 27 (brackets omitted). And even if WARA

had incorporated Dallas' commitment to eliminate the Lemmon Avenue gates, the court explained, it would not be a physical taking because that commitment "required Dallas to negotiate with [petitioners] and then, if negotiation proved unsuccessful, bring a condemnation proceeding pursuant to which [petitioners] would receive just compensation." *Id.* at 28. The court thus concluded that "the requirement that Dallas acquire [petitioners'] property through the exercise of eminent domain would not be a taking by the United States." *Ibid.*

ARGUMENT

Petitioners seek review (Pet. 21-27) of the court of appeals' conclusion that they failed to establish that WARA had a negative economic impact on their leases. Petitioners further contend (Pet. 27-32) that the court erred in declining to value the leases based on what petitioners assert was a reasonable, investment-backed expectation that the Wright Amendment would be repealed. Although petitioners contend that the court adopted categorical rules that regulatory changes are irrelevant to the calculation of fair market value and that no taking can occur if property is generating a negative cash flow, those arguments rest on a mistaken view of the court's decision. The court instead looked at the particular facts surrounding petitioners' investment and reached a record-specific conclusion based on those facts. The court's decision is correct and does not warrant this Court's review.

1. The court of appeals correctly determined that petitioners could not establish that WARA effected a taking of their property because they did not present evidence of an adverse economic impact.

a. At the outset, petitioners err in contending that WARA "expressly prevented use of [their] property for

commercial air passenger service." Pet. 16-17 (citation and internal quotation marks omitted). The court of appeals reserved judgment on that question, stating that it would "assume, without deciding," that petitioners had correctly characterized WARA as "effectively barr[ing] [them] from using the Lemmon Avenue Terminal for commercial air passenger service." Pet. App. 12. But the statute did not prohibit petitioners from using their leased property for that purpose, providing an alternative basis to affirm the court of appeals' judgment.

Petitioners argue (Pet. 19) that WARA prohibited use of the leases to provide commercial air service because WARA allegedly incorporated the entire Five-Party Agreement reached among Dallas, Fort Worth, Southwest Airlines, American Airlines, and the DFW Airport Board, "including Dallas' obligation to demolish petitioners' terminal." But the court of appeals correctly rejected that argument in determining that WARA did not constitute a physical taking—a determination that petitioners do not challenge here. Pet. App. 26-29. The court explained that "WARA did not codify the Five-Party Agreement in its entirety and specifically did not codify the portions of the Agreement in which Dallas agreed to acquire and demolish [petitioners'] gates." *Id.* at 26; see H.R. Rep. No. 600, 109th Cong., 2d Sess. Pt. 1, at 4 (2006) ("In the spirit of the Wright Amendment, H.R. 5830 is crafted narrowly to codify only those aspects of the [Five-Party Agreement] that require changes to federal law."); *City of Dallas* v. *Delta Air Lines, Inc.*, 847 F.3d 279, 282 (5th Cir. 2017) (recognizing in a case concerning the allocation of gates at

Love Field that WARA did not incorporate the entire Five-Party Agreement).[*]

Nor did WARA "preclude[] any aviation from the Lemmon Avenue Terminal," as petitioners assert (Pet. 13). WARA refers to the Lemmon Avenue Terminal only once, providing that "[n]o Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act." § 5(b), 120 Stat. 2012. As the court of appeals recognized, "the requirement that federal funds not be used for removal of Lemmon Avenue gates explicitly *distances* the federal government from Dallas' intended action." Pet. App. 27 (emphasis added). And while WARA capped the total number of gates at Love Field to 20, see § 5(a), 120 Stat. 2012, the statute did not identify a particular location for those gates. WARA provided that Dallas should allocate gates "in accordance with contractual rights and obligations" for certificated air carriers, *ibid.*, but WARA did not specifically dictate how Dallas should satisfy all of its obligations, including any obligations it had to petitioners, or where the gate reductions should take place. Accordingly, WARA itself, independent of any contractual rights and obligations Dallas might

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[*] Petitioners criticize (Pet. 1, 12, 19) the Five-Party Agreement, asserting that they were "conspicuously absent" from negotiations. But the United States is not a party to the Agreement, and it did not agree to take any action directed at petitioners' leases or terminal. Petitioners pursued antitrust claims against the parties to the Five-Party agreement, but those claims were unsuccessful and petitioners did not seek this Court's review in those cases. See *Love Terminal Partners, L.P.* v. *City of Dallas*, 527 F. Supp. 2d 538, 560 (N.D. Tex. 2007); *Love Terminal Partners, L.P.* v. *City of Dallas*, 256 S.W.3d 893, 897 (Tex. Ct. App. 2008).

have had, would not have prevented Dallas from reducing gates at the main terminal to reach the 20-gate total, leaving the Lemmon Avenue Terminal gates untouched.

Petitioners also erroneously assert that WARA "forbade Dallas to take 'any other actions' 'inconsistent with' the Five-Party Agreement." Pet. 13 (citation omitted). The quoted language imposed obligations not on Dallas but on the Secretary of Transportation and the Administrator of the Federal Aviation Administration. WARA § 5(d)(1), 120 Stat. 2012; see Pet. App. 329. WARA therefore did not require Dallas to implement the Five-Party Agreement, but rather merely prevented federal agencies from taking action inconsistent with that agreement. WARA left the fate of petitioners' gates entirely in the hands of Dallas, not the United States. Because WARA did not prohibit petitioners from using their leases to provide commercial air service from the Lemmon Avenue Terminal, petitioners' arguments that such a prohibition would constitute a taking are not suitable for review.

b. In any event, the court of appeals correctly determined that, even if WARA were construed to effectively prevent use of the Lemmon Avenue Terminal for commercial air service, petitioners failed to establish the economic impact of that restriction. As the court observed, the economic impact of the government action is relevant to the analysis under the framework for categorical takings articulated in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the test for regulatory takings adopted in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). See Pet. App. 16. Specifically, under *Lucas*, a categorical taking occurs in "relatively rare situations where the

government has deprived a landowner of all economically beneficial uses" of the property. 505 U.S. at 1018. And under *Penn Central*, courts must assess the "economic impact of the regulation on the claimant." 438 U.S. at 124. As the court of appeals observed, "[t]here cannot be a regulatory taking in the absence of economic injury" that is "caused by the government action at issue, not by some other factor." Pet. App. 15-16.

The court of appeals determined that petitioners had failed to introduce relevant economic evidence because they never sought to establish the value of their leases under the restrictions of the Wright Amendment, which had been in place for nearly two decades before they first entered into those leases. Pet. App. 16-19. "None of [petitioners'] experts assessed the use or value of [petitioners'] leaseholds with the Wright Amendment in effect—despite the fact that the Wright Amendment was the governing law at the time of the alleged taking and had been for over a quarter century before then." *Id.* at 18. Instead, petitioners' experts examined the hypothetical value of the leases "under a regime in which the Wright Amendment was repealed or modified." *Id.* at 17-18. Because petitioners had not attempted to "show that their property had value in the regulatory environment that existed before the government action, and that this value was diminished by the government action that prevented them from operating under the existing regime," the court concluded that they failed to establish a taking. *Id.* at 18.

The court of appeals further observed that there was no indication that petitioners could have established that their leases had value under the Wright Amendment had they sought to do so. Pet. App. 18. The court noted

that petitioners' "historical financial performance suggests that their property was *not* valuable for air passenger service with the Wright Amendment in place," based on record evidence about petitioners' unsuccessful attempts to market the Lemmon Avenue Terminal. *Ibid.* In particular, the court cited evidence that "Legend, the tenant for which the Lemmon Avenue Terminal was designed, went bankrupt in December 2000, eight months after beginning operations." *Ibid.* And even "during the period when Legend was operational," the court observed, revenue from the terminal did not "exceed [petitioners'] carrying costs." *Id.* at 19. The court also cited evidence that the only other airline ever to use the terminal—Atlantic Southeast Airlines—provided service for less than one year and "moved its operations to Love Field's main terminal" shortly after Legend went bankrupt. *Id.* at 4, 19. Petitioners thereafter "attempted to market [their] gates to other potential users, but no commercial airline was interested in leasing the gates" and petitioners "never received an actual offer" for use of the terminal. *Ibid.* The result was that "by the time of WARA's enactment[,] no airline had used the Lemmon Avenue Terminal or paid any rent to [petitioners] for more than five years," and petitioners had suffered "a net income loss of roughly $13 million" from the time they acquired their leases to WARA's enactment in 2006. *Id.* at 19.

Petitioners contend (Pet. 20, 25) that the court of appeals adopted a "categorical rule" 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." But the court did not announce any such rule. The court's analysis of economic impact primarily focused on petitioners' decision not to introduce relevant evidence

about the value of the leases under the regulatory regime in place at the time the alleged taking occurred. While the court then went on to evaluate the limited record evidence about the use of the property under the restrictions of the Wright Amendment, the court nowhere suggested that it was adopting a bright-line rule that a taking can never occur unless the property is generating revenue at the time of the action alleged to result in a taking. Instead, the court reached a case-specific determination about value based on the particular facts of this case.

Petitioners take issue (Pet. 24-25) with the court of appeals' factual determination of the value of their leases under the Wright Amendment, but the court did not err in evaluating the record evidence. Petitioners argue (Pet. 12, 25) that there was a "near-consummation of a $100 million sale" of their leases to Pinnacle Airlines for use of the Lemmon Avenue Terminal, but the court explained that petitioners "never received an actual offer" for the leases. Pet. App. 19. And the record makes clear that it was *Hampstead*—the group that controls petitioners—that proposed $100 million to Pinnacle, and that Pinnacle never responded to that proposal with a counter-offer of any amount. See C.A. App. 544-550, 3063-3085; see also Pet. App. 65-66.

Petitioners also contend (Pet. 22) that the court of appeals should have considered not just how the Lemmon Avenue Terminal was being used when WARA was enacted, but also the "possible uses to which it could be employed." But the court *did* consider whether the terminal could profitably be used to provide commercial air service even though it was not being used for that purpose when WARA was enacted. Pet. App. 18-19. Because "[n]one of [petitioners'] experts assessed the use

or value of [petitioners'] leaseholds with the Wright Amendment in effect," the court reviewed the historical evidence about petitioners' unsuccessful attempts to market the terminal for over five years. *Id.* at 18. To the extent that petitioners now contend that the court should have considered additional evidence, its failure to do so is attributable to petitioners' own litigation choices.

Nor is there tension between this Court's decision in *Lucas* and the court of appeals' analysis of the record in this case, as petitioners contend (Pet. 20). In *Lucas*, the property at issue consisted of undeveloped beachfront lots, 505 U.S. at 1008, and the property owner had introduced evidence from which the trial court concluded that the lots were worth $1,170,000 in the absence of the development restriction alleged to constitute a taking. See App. C to Pet. for a Writ of Cert. at 38, *Lucas* v. *United States*, No. 91-453 (Sept. 13, 1991) (factual findings of trial court). In this case, in contrast, the court of appeals found that petitioners did not offer any evidence about the value of their leases under the regulatory regime that existed at the time of the alleged taking, Pet. App. 17-18 & n.2, and the court determined based on the available record evidence that petitioners had not been able to successfully market their developed airport leasehold because the airline for which the terminal was designed went bankrupt and no other airlines were "interested in leasing the gates," *id.* at 4, 18-19. Petitioners' disagreement with the court of appeals' factbound determination of the value of their leases before WARA's enactment does not warrant this Court's review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that the

Court "do[es] not grant a [writ of] certiorari to review evidence and discuss specific facts").

2. The court of appeals also correctly determined that petitioners could not establish a taking because, contrary to their assertion, they lacked "a reasonable, investment-backed expectation in the outright repeal of the Wright Amendment." Pet. App. 19.

a. At the outset, petitioners err in contending that "[t]he Federal Circuit did not dispute" that petitioners "reasonably 'believed that the Wright Amendment would be repealed.'" Pet. 29 (citation omitted). To the contrary, the court of appeals expressed skepticism that petitioners had any such expectation when they acquired their leases. Pet. App. 20 & n.4. As the court explained, petitioners' business plan "indicated that they specifically intended to operate within—and even take advantage of—the Wright Amendment's plane size and destination restrictions." *Id.* at 20 n.4.

Moreover, even if petitioners had subjectively expected that the Wright Amendment would be repealed, the court of appeals "question[ed]" whether such an expectation "would have been reasonable." Pet. App. 20. "Any expectation of Wright Amendment repeal in 1999 or 2003 [when petitioners acquired their leases] was speculative" because "[t]he Wright Amendment had been in effect for two decades and, during that time, the only legislative movement towards total repeal was a bill * * * on which no action was ever taken." *Id.* at 20 n.5. The record accordingly does not support a claim that petitioners actually expected the repeal of the Wright Amendment when they invested in their leases or that any such expectation would have been reasonable.

b. Petitioners' contention that they had a reasonable, investment-backed expectation that the Wright

Amendment would be repealed is additionally flawed because it would premise takings liability on an investor's speculation that Congress might change the law in the future. As the court of appeals explained, the reasonable, investment-backed expectations analysis for determining whether a taking has occurred "is not designed to protect private predictions of regulatory change," but rather "to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted." Pet. App. 20-21. Petitioners' proposed rule would transform the Just Compensation Clause into an insurance policy for investors who place speculative bets on a potential change in federal law: if Congress changes the law, the investment pays off, and if Congress does not make the predicted change, the investor can seek just compensation for an alleged taking. Petitioners cite no cases that have stretched the concept of reasonable, investment-backed expectations to include an expectation at the time of the investment that Congress will act in the future to change the regulatory regime, and the court of appeals correctly recognized that such an "approach is unsound." *Id.* at 20.

c. Petitioners fare no better with their argument (Pet. 27-32) that, even if they had no reasonable, investment-backed expectation of the Wright Amendment's repeal at the time they acquired their leases, they later developed such an expectation and their leases should accordingly have been valued as though the Wright Amendment's restrictions did not apply.

Petitioners are wrong to contend (Pet. 30) that the court of appeals adopted a categorical rule that "the market's reasonable expectation of regulatory change

[is] legally irrelevant to the economic-impact inquiry." To the contrary, the court stated that "[i]t is undoubtedly true that, when assessing the economic impact of a particular government action alleged to constitute a taking, a court can consider the extent to which other, unrelated, reasonably probable zoning or regulatory changes may have influenced the property's fair market value." Pet. App. 23.

But as a factual matter, while petitioners claim (Pet. 32) that the "market perceived that the restrictions [of the Wright Amendment] would not last," petitioners never received an offer for their leases that reflected any such market perceptions. See Pet. App. 4, 19. And although petitioners contend (Pet. 32) that the enactment of WARA proved that they were "prescient about the unsustainability of the [Wright Amendment's] restrictions," WARA itself enacted new limitations on Love Field—including the 20-gate cap—that petitioners ignore when arguing that their property should be valued based on reasonably anticipated regulatory changes. See Pet. App. 86 n.20 (summarizing how petitioners' expert offered valuation evidence on the counterfactual assumption that "someone assessing the property before the WARA's passage would have known that the legislation was going to be enacted, but not that it was going to restrict Love Field to just twenty gates").

Petitioners assert (Pet. 29) that "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." But petitioners' cases—which arose in the context of calculating the amount of just compensation in condemnation proceedings, rather than in the context of determining whether

a regulatory taking had occurred—involved zoning laws subject to variances or other readily attainable revisions that were unrelated to the government action alleged to constitute a taking. See, *e.g.*, *United States* v. *33.92356 Acres of Land*, 585 F.3d 1, 7 (1st Cir. 2009) (addressing valuation of condemned property in light of zoning restrictions); *United States* v. *174.12 Acres of Land*, 671 F.2d 313, 316 (9th Cir. 1982) (holding that the lower court did not err in considering the limitations on the development of property based on state and federal law). As the court of appeals recognized, those cases "emphasize that [petitioners] cannot seek compensation for economic value attributable to the project for which the property was taken." Pet. App. 24. Under those cases, petitioners' suggestion that WARA's deregulatory aspects enhanced the value of their property at the same time as WARA allegedly effected a taking of their property lacks merit. *Id.* at 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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