STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON REMAND FROM THE U.S. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable John L. Breeden, Jr., Master-in-Equity

Case No. 94-CP-26-3154

Sam B. McQueen ……Respondent

v.

South Carolina Coastal Council, n/k/a/ South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management…….Petitioner

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BRIEF OF AMICI CURIAE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

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Amici Curiae Municipal Association of South Carolina ("MASC") and the International Municipal Lawyers Association (IMLA) respectfully submit this brief in support of Petitioner South Carolina Coastal Council ("Coastal Council").[1]

PRELIMINARY STATEMENT ON THE EFFECT OF THE GVR ORDER

At the outset, it should be noted that the U.S. Supreme Court's June 29, 2001 remand order -- also called a "GVR" order (*granting* certiorari, *vacating* the judgment, and *remanding* the case for further consideration) -- does not imply any expectation of a different outcome on remand. The Order merely requires additional consideration in light of the intervening ruling in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). As noted by Justice Scalia, the Court "routinely GVR[s] 'unimportant' cases in light of [its intervening] opinions." *Thomas v. American Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (concurring). Indeed, "*most* of the cases in which [the Court] exercise[s its] power to GVR plainly do not meet the 'tests' set forth in Rule 10" that governs the grant of certiorari. *Id*. at 914-15 (emphasis in original).

Lower courts consistently have ruled that GVR orders do not suggest that a prior ruling needs to be adjusted. *E.g., United States v. M.C.C. of Florida, Inc*., 967 F.2d 1559, 1562 (11th Cir. 1992) ("The Supreme Court did not take a position on whether [an intervening ruling] actually affected the outcome of [the court's earlier ruling], but was instructing this court to make that determination" and thus the court "was free to adopt any or all" of its prior ruling.); *United States v. National Soc'y of Prof'l Eng'rs*, 555 F.2d 978, 982 (D.C. Cir. 1977) (dismissing as "speculative reconstruction" the argument that a GVR order implies an expectation of a different result), *aff'd*, 435 U.S. 679 (1978); *see also Hughes Aircraft Co. v. United States*, 140 F.3d 1470,

[1] By order dated March 22, 2002, this Court granted MASC's motion for leave to file. IMLA's motion for leave to join this brief is being filed simultaneously with this brief.

1473 (Fed. Cir. 1998) (GVR orders do "not create an implication that the lower court should change its prior determination."), *overruled on other grounds*, 234 F.3d 558 (Fed. Cir. 2000). In one study of 90 GVR-ed cases in which there was at least a surface inconsistency between the vacated judgment and the intervening decision, the lower court adhered to its original ruling more than 66% of the time. *See Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1279 n.5 (N.Y. 1991) (citing Arthur D. Hellman, *Granted, Vacated, and Remanded -- Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 394-395 (1984)).

Thus, it would be entirely appropriate for a court to reaffirm its prior ruling, either for the same reasons or on new grounds not previously considered. *See Immuno AG.,* 567 N.E.2d at 1279 (a GVR order "does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an alternative basis for resolving the case"). As shown below, this Court should reaffirm its prior rejection of Mr. McQueen's takings claim.

ARGUMENT

In its May 24, 2000 ruling, this Court rejected McQueen's takings claim because the challenged Coastal Council regulations did not interfere with any reasonable expectation to destroy the coastal wetlands at issue by filling and developing the property. The Court emphasized that when McQueen purchased the property, it had "been the subject of at least some developmental regulation for over a century." *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 76, 530 S.E.2d 628, 634 (S.C. 2000). The Court also stressed that McQueen lacked the requisite reasonable expectation to build on the lots in view of his "prolonged neglect of the property and failure to seek development permits in the face of ever more stringent regulations * * *." *Id*. at 76, 530 S.E.2d at 634-45.

After the remand by the U.S. Supreme Court, this Court ordered additional briefing on (1) whether the Court of Appeals erred in finding that the Coastal Council regulations deprived McQueen of all economically valuable use of the property; (2) whether background principles of South Carolina property or nuisance law absolve the State from compensating McQueen; and (3) whether investment-backed expectations are relevant to determining damages.

This brief addresses the first two issues. Section I shows that the appeals court did err in concluding that the Coastal Council regulations deny McQueen all economically valuable use of the beachfront property. McQueen's *per se* takings claim suffers a fatal deficiency because he failed to present any evidence showing that the property has been left valueless or with only token value. The mere inability to build is insufficient to support a *per se* claim. Section II shows that background principles of state property law deprive McQueen of the property interest alleged to have been taken and thus absolve the State from compensating McQueen. Regarding the third issue, amici agree with the Coastal Council's comprehensive showing that because McQueen failed to show interference with any reasonable expectation, the State owes no compensation, and we see no reason to add further argument on this point.

I. McQueen Failed to Show that the Coastal Council Regulations Deny All Economically Valuable Use of the Property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that a *per se* taking may occur where regulation deprives land of all economically valuable use. *Id.* at 1015-19. This bright-line, *per se* rule applies only to what the Court called a "total taking." *Id.* at 1030. As explained in this Section, a landowner may not prevail on a *Lucas* total-taking claim by showing only that the property is unbuildable. *Lucas* does not create a compensable "right to build." Rather, the claimant's burden under the *Lucas* total-taking rule is to demonstrate a denial of all use and value, a burden typically met through appraisal evidence or other valuation

evidence showing that the property has been left valueless or, in the words of the *Palazzolo* Court, with only "token" value. 121 S. Ct. at 2475.

David Lucas met this burden by convincing the trial court through appraisal evidence to find that the challenged regulation left his property "valueless."[2] In contrast, McQueen offered no such appraisal evidence, erroneously relying solely on his inability to build in his attempt to show a *per se* taking under *Lucas.* Because McQueen's property retains recreational and aesthetic uses, and because he failed to show that the remaining uses generate no value, his *Lucas* claim fails.[3]

A. *Lucas* and *Palazzolo* Make Clear that the *Lucas Per Se* Rule Applies Only Where Land is Left Valueless or With Only Nominal Value.

The *Lucas* Court made clear that its *per se* rule turns on remaining value, not on any purported "right to build." *Lucas* states unequivocally if land retains as little as 5% of its unregulated value, the *per se* rule does not apply. *Id*. at 1019-20 n.8. This ruling came in response to a hypothetical posed by Justice Stevens in dissent regarding a landowner whose

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[2] *Lucas*, 505 U.S. at 1020 ("The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban."). The trial court's finding that Lucas's lots had been rendered valueless was based on testimony by an appraiser that the development ban "caused the value of the lots to plummet to zero * * *." Lucas v. South Carolina Coastal Council, 304 S.C. 376, 398, 404 S.E.2d 895, 907 (1991) (dissent).

[3] Although McQueen might argue that the State somehow "waived" this issue, it is important to note that throughout this litigation the State has emphatically contested McQueen's assertion that the permit denial deprived him all economically valuable use. *E.g.* Record on Appeal, Vol. 1, at 119 ("I don't think there's any evidence in the Administrative Record that we have deprived Mr. McQueen of all economically viable use. It was incumbent upon him to present that evidence and it's not in there, and I challenge [counsel for McQueen] to show me[,] it's not in there."); *id*. at 120 ("There is nothing in that record where you can make a finding that after application of the regulation[, McQueen] has been denied all economically viable use of the property. That issue just was not explored * * *."). Thus, this Court properly called for additional briefing on this central component of McQueen's *per se* claim under *Lucas*.

property is diminished in value 95%. In language that could not be clearer, the *Lucas* Majority held that "in at least *some* cases the landowner with 95% loss [in value] will get nothing" under the Takings Clause because such an owner would "not be able to claim the benefit of [the *Lucas*] categorical formulation." *Id*. Both the *Lucas* Majority and Justice Stevens in dissent agreed that only "the landowner who suffers a complete elimination of value" recovers under the *per se* rule. *Id*. at 1019 n.8 (emphasis added, citing Justice Stevens's dissent, 505 U.S. at 1064). This exchange shows that the *per se* rule is inapplicable where land may be sold for 5% of its original value, even where the land is unbuildable. The inquiry that drives the *per se* rule is value, not the ability to build.

In last Term's *Palazzolo* ruling, the Court confirmed that the *Lucas per se* rule is inapplicable where land retains more than nominal value. The *Palazzolo* Court affirmed the Rhode Island Supreme Court's rejection of Palazzolo's *per se* claim under *Lucas* because Palazzolo "failed to establish a deprivation of all economic value * * *." *Palazzolo*, 121 S. Ct. at 2465; *see also id*. at 2476 (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting) ("a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim"). To be sure, *Palazzolo* clarified that the government may not defeat a *Lucas* claim by showing that the landowner retains what the Court called "token" value or mere "crumbs" of value, *id*. at 2475, but the ruling reaffirmed that a *Lucas* claim lies only where regulation leaves land with nominal or no value.

Palazzolo serves as a real-world illustration of the exchange between the *Lucas* Majority and dissent regarding the inapplicability of the *per se* rule to a 95% value loss. It was undisputed in *Palazzolo* that the land at issue was worth at least $200,000. 121 S. Ct. at 2464. Palazzolo alleged that the unregulated value of the land was $3,150,000, *id.* at 2456, and he asserted a *per se* takings claim under *Lucas*, arguing that he retained only 6% of his land's $3,150,000

unregulated value. *Id*. at 2464. The *Palazzolo* Court held that a 94% value loss does not support a *per se* claim. *See* 121 S. Ct. at 2456, 2464-65. Not a single Justice dissented from this ruling.

Palazzolo does not explain precisely what the Court meant by "token" value that would be insufficient to defeat a *Lucas per se* claim. But because both *Palazzolo* and *Lucas* reject the suggestion that a 94-95% value loss may support a *per se* claim, Palazzolo's assertion regarding token value must refer to truly de minimis value, something significantly less than 5%. *See Animas Valley Sand & Gravel v. Board of County Comm'rs*, 38 P.3d 59, 65-67 (Colo. 2001) (*Palazzolo* shows that the *Lucas per se* rule applies only where land is left valueless or with only de minimis value, and that a non-*per se* taking may occur only where regulation leaves a landowner with "a value slightly greater than de minimis").

The U.S. Court of Appeals for the Federal Circuit -- the court with appellate jurisdiction over takings claims against the United States -- has issued one of the first and most significant interpretations of *Palazzolo*. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (on petition for reh'g). The Federal Circuit reads *Palazzolo* as reaffirming that no *per se* taking occurs unless regulation leaves land valueless: "The [*Palazzolo*] Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical taking." *Id.* at 1349.

Although the *per se* rule under *Lucas* is very narrow, *Palazzolo* makes clear that takings claimants whose land is not rendered valueless still may seek compensation under the multi-factor test articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See Palazzolo*, 121 S. Ct. at 2457. McQueen has chosen not to pursue a *Penn Central* claim in this litigation, instead arguing exclusively under *Lucas*. *E.g.,* Record on Appeal, Vol. 1, at 71-81, 125-27. Presumably, McQueen made this strategic decision to rely solely on *Lucas* because

Penn Central requires consideration of the character of the challenged action, a factor that would doom McQueen's claim in view of the strong public interest underlying protecting South Carolina's precious coastal resources. Having decided to rely exclusively on *Lucas*, and having failed to show through valuation evidence that the property has been left valueless or with only de minimis value, McQueen's claim fails.

It should come as no surprise that to show a denial of all economically valuable use under *Lucas*, a landowner must demonstrate that the landowner may not sell the land for value. Indeed, the *Lucas* Court reaffirmed the commonsense notion that the sale of property for value is an economically beneficial use of that property. *Id*. at 1027-28 (discussing situations where "the property's only economically productive use is sale or manufacture for sale"). For many real estate investors who buy and sell raw acreage to profit from the appreciation, the selling of vacant land is the only economically beneficial use they ever make of it. Because *Lucas*'s *per se* rule applies only where regulation denies *all* beneficial use, it is inapplicable where the owner is able to sell the land for value.

The critical role of value to the *per se* rule permeates the entire *Lucas* opinion. The very first paragraph recites the trial court's finding that the challenged development ban rendered Mr. Lucas's land "valueless," and it then articulates the question presented as whether the development ban effects a taking due to its "dramatic effect on the economic value of Lucas's lots." 505 U.S. at 1007. The Court described Lucas's complaint as rooted in the government's "complete extinguishment of his property's value." *Id*. at 1009. It characterized the state supreme court's ruling as finding no taking "regardless of the regulation's effect on the property's value." *Id*. at 1010. Thus, the record and posture of *Lucas* starkly presented the U.S. Supreme Court with the issue of whether a complete obliteration of value effects a taking.

In delineating its *per se* rule, the *Lucas* opinion once again emphasized the key factual predicate that underlies the *per se* rule: the trial court's finding that the lots had been "rendered valueless" by the regulation at issue. 505 U.S. at 1020. The pivotal nature of this finding is evidenced by the Majority's specific justification for accepting it,[4] as well as the skepticism regarding its accuracy expressed by each of the four separate opinions in the case.[5]

To reinforce this point, the Court distinguished several earlier cases that found no taking because "[n]one of them * * * involved an allegation that the regulation wholly eliminated the value of the claimant's land." *Id*. at 1026 & n.13. One of the cases so distinguished -- *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) -- involved a value loss of 92.5% (from $800,000 to $60,000), further demonstrating that the *Lucas per se* rule applies only where land suffers a near 100% value loss.

B. Other Precedent Confirms the Central Role of Value in Takings Analysis.

The *Lucas* Court's treatment of use and value as virtually synonymous reflects the Court's historic understanding of these concepts in takings analysis. *Lucas* relies heavily on *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which holds that a taking may occur where zoning denies a landowner economically viable use of the land. *Id*. at 260. As in *Lucas*, the *Agins* Court was careful to stress that this inquiry required examination of the "diminution in market value"

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[4] *Id*. at 1020 n.9 (trial court's finding that the lots were rendered valueless "was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument * * * that the finding was erroneous.").

[5] *Id*. at 1034 (Kennedy, J., concurring in the judgment) ("I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction"); *id*. at 1043-44 (Blackmun, J., dissenting) ("The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous."); *id*. at 1065 n.3 (Stevens, J., dissenting) (the "land is far from 'valueless.'"); *id*. at 1076 (Souter, J., statement) (trial court's finding that the development ban rendered the land valueless is "highly questionable").

caused by the zoning at issue. *Id.* at 262; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 n.29 (1987) (it could not be determined whether the claimants were denied economically viable use of their support estate in coal because "[t]here is no record as to what value" the support estate had). Just one year after *Lucas*, a unanimous Supreme Court cited with approval cases finding no taking despite land value losses exceeding 90%. *See Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.,* 508 U.S. 602, 645 (1993) (citing *Hadacheck* and other cases).

More recently, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court examined a takings claim based on regulation that allegedly "deprived [the claimant] of 'all reasonable and economically viable use' of her property." *Id*. at 731. Although the agency argued that the claim was unripe because the claimant did not attempt to sell her transferable development rights (TDRs), the Court deemed the claim ripe because the trial court could determine a market value for the TDRs without an actual sale. *Id*. at 740-42. In other words, the lower court could decide whether the claimant lost all economically valuable use because the record allowed for a determination of value. As in *Lucas*, value evidence drove the economically-valuable-use inquiry.

Long before *Lucas*, the Court expressed special concern for regulation that completely devalues property. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872), the Court found that flooding of property effected a taking because it caused the "total destruction" of the land and "destroy[ed] its value entirely." *Id*. at 177-78. And Justice Scalia, the author of *Lucas*, has written elsewhere that "[t]raditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the Takings Clause]." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

Lower courts likewise look to value to determine whether regulation denies land economically viable use. For instance, in *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (five-judge panel), the Federal Circuit rejected the precise position urged by McQueen. In assessing whether a permit denial deprived a landowner of "economically viable use," the *Florida Rock* court held that where the owner can mitigate the impact of the regulation by selling the property for value, "that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred * * *." *Id*. at 903. Other lower courts are in accord.[6] And legal scholars across the philosophical spectrum agree that the *per se* rule of *Lucas* is limited to government action that renders land valueless.[7]

In short, *Lucas*, *Palazzolo*, other Supreme Court precedent, and *Lucas*'s progeny compel the conclusion that the *Lucas per se* rule applies only where a landowner shows that the land has been left valueless or with only nominal value.

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[6] *E.g.*, Stern v. Halligan, 158 F.3d 729, 734 n.7 (3d Cir. 1998) (denial of all economically viable use under *Lucas* requires "the total destruction of value"); Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 286 & n.5 (4th Cir. 1998) (no taking under *Lucas* where government action "did not deprive [claimant's] land of all economic value;" "even where the only residual economic uses of land are recreational, such as camping or picnicking, economic value still remains"); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (claimant was not denied all economically viable use, despite an 89% value loss, because the land "retains a substantial value that establishes the existence of residual economically feasible uses"); *see also* Zealy v. City of Waukesha, 548 N.W.2d 528, 534 (Wis. 1996) (background-principles defense is required to preclude *per se* takings liability only where "as in *Lucas*, the value of the land at issue is 'wholly eliminated'").

[7] *Compare* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1435 (1993) (the *Lucas per se* rule applies where government action "deprives an owner of all economic value in real property") *with* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1375-76 (1993) (criticizing *Lucas*'s focus on value and the Court's ruling that the *per se* rule does not apply unless regulation deprives land of all value).

C. McQueen Failed to Establish a *Per Se* Taking Under *Lucas* Because There is No Valuation Evidence Showing That the Property Has Been Left Valueless or With Only Nominal Value.

The appeal court's 2-1 ruling in this case contains a striking anomaly. It concludes that the permit denial deprived McQueen of all economically valuable use of the property, but it then recites undisputed record evidence, from McQueen's own testimony, that the tax assessment value for each of the two lots is $22,800. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 600, 496 S.E.2d 643, 650 (Ct. App. 1999). The combined tax assessment value for the two lots -- $45,600 -- is more than ten times McQueen's initial $4,200 investment in the property. Importantly, it is evidently impossible to tell from the record whether the tax assessment value of $28,000 assumes that the lots are buildable or unbuildable. Record on Appeal, Vol. 1, at 120 (counsel for the Coastal Council: "[I]t's not clear whether that [$22,800 tax assessment] value is with or without regulation."); *id*. at 204 (Mr. McQueen: $22,800 is the "current tax assessed value" for each lot). It is remarkable, to say the least, to conclude that a regulation denied a landowner all economically valuable use where the record is unclear whether he has turned a ten-fold profit on the land notwithstanding the challenged regulation.

Even if one assumed *arguendo* that the tax assessment valuation reflects the value of the property as buildable lots, McQueen's *per se* claim under *Lucas* is fatally flawed because he failed altogether to submit any evidence showing that the permit denial left the property valueless or with only nominal value. In stark contrast to David Lucas, who proved that regulation rendered his land "valueless" (*Lucas*, 505 U.S. at 1020), McQueen failed altogether to offer valuation evidence. The record shows that even though the lots are unbuildable, they retain recreational and aesthetic uses. Record on Appeal, Vol. 1, at 146-47 (testimony of Mr. Caldwell); *id*. at 199-200 (testimony of Mr. Chinnis: although the lots are unfillable, they retain

the uses identified by Caldwell). The appeal court likewise recognized that the lots retain recreational and aesthetic uses. *McQueen*, 329 S.C. at 600, 496 S.E.2d at 650. Although McQueen argues that any recreational use would be "indirect" -- a term whose meaning is not fully developed in the record -- McQueen failed altogether to present evidence showing that the remaining aesthetic and recreational uses are without value.

Many courts have concluded that precisely these kinds of recreational and aesthetic uses yield sufficient value to defeat a *per se* claim. *E.g.*, *MC Assocs. v. Town of Cape Elizabeth*, 773 A.2d 439, 445 (Me. 2001) (granting the defendant summary judgment in a takings challenge to wetland protections because the claimant's evidence that property was worth only $3,000 as a non-buildable lot does not support a finding of a categorical taking); *Wyer v. Board of Envtl. Protection*, 747 A.2d 192, 193 (Me. 2000) (denial of a variance under a sand dune protection law did not effect a taking due to value derived from recreational and aesthetic uses); *State of Florida v. Burgess*, 772 So. 2d 540, 543 (Fla. Ct. App. 2000) (rejecting the landowner's argument that recreational uses are not economically viable uses under *Lucas*); *Darack v. Mazrimas*, 5 Mass. L. Rptr. 469 (Mass. Super. Ct. 1996), 1996 WL 406270, at *3 (rejecting a takings challenge to floodplain restrictions that prohibited house construction because the owner failed to produce evidence of the value of the parcel for recreational and other uses allowed by the ordinance); *see also* cases cited in note 6, *supra*.

McQueen's position reflects a fundamental misunderstanding of the *Lucas per se* rule. He may not prevail simply by showing that the lots are unbuildable, particularly where there is undisputed record evidence that the lots retain recreational and aesthetic uses. In contrast to David Lucas, McQueen failed altogether to show that the lots at issue were rendered valueless or with only truly nominal value as required by *Lucas* and *Palazzolo*.

II. The Public Trust Doctrine and Other Background Principles of State Property Law Absolve the State from Takings Liability Because They Deprive McQueen of the Property Interest Alleged to Have Been Taken.

The *Lucas* Court made clear that the government may avoid liability for a taking where "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the owner's] title to begin with." *Lucas*, 505 U.S. at 1027. The Court stressed that even if regulation prohibits all economically valuable use of land, no taking occurs where the challenged restriction is justified by "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029.

We agree with the Coastal Council that the Public Trust Doctrine and South Carolina common law on nuisance serve as background principles that preclude McQueen from ever owning the property interest alleged to have been taken. *See, e.g.*, *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (S.C. 1972) (public trust doctrine); *State v. Pacific Guano Co.*, 22 S.C. 50 (S.C. 1884) (same); *Horry County v. Woodward*, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (S.C. Ct. App. 1984) ("lands gradually encroached upon by water cease to belong to the former riparian or littoral owner").

Rather than repeat the Coastal Council's analysis of these doctrines, we show in this Section that the background-principles defense under *Lucas* is a vibrant, well-accepted doctrine that is frequently invoked by courts to reject takings claims.

Lucas makes clear that the background-principles defense involves straightforward legal inquiries. For example, the *Lucas* Court states that when deciding whether state nuisance law constitutes a background principle that defeats takings liability, courts should analyze "the degree of harm to public lands and resources or adjacent private property posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality

in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." *Lucas,* 505 U.S. at 1030-31 (citations omitted). In other words, the inquiry does not require the court to find precedent identical to the case at hand, but instead to apply general common law principles to the new facts and circumstances to determine whether those principles would preclude the claimant's land-use proposal.

Significantly, *Lucas* stresses that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id*. at 1031. *Lucas* also explains that an objectively reasonable application of the relevant precedents during the background principles inquiry entails "some leeway in a court's interpretation of what existing state law permits." *Id.* at 1032 n.18. Indeed, the common-law rarely reduces to the simple application of precedents to fact patterns on all fours with prior cases. *Cf*. Oliver Wendell Holmes**,** Jr., THE COMMON LAW 1 (1881) (the common law must evolve through experience and "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics").

Some takings claimants argue that the background-principles inquiry is limited to nuisance, and does not extend to other common-law doctrines like the Public Trust Doctrine. But *Lucas* describes the background-principles defense no less than four times as embracing both state nuisance law and state property law. *See Lucas,* 505 U.S. at 1029 (referring to the "background principles of the State's law of property and nuisance * * *"); *id*. at 1030 (referring to the "relevant property and nuisance principles * * *"); *id.* (referring to "background principles of nuisance and property law * * *"); *id*. at 1031 (same). *Palazzolo*, too, reiterates that background principles that defeat takings claims include the full range of a state's property law. *Palazzolo*, 121 S. Ct. at 2464 (referring to "background principles of the State's law of property

and nuisance"; quoting *Lucas*). These repeated references make clear that the background-principles inquiry includes the full range of state property law. This Court's reference to state property law in its order calling for additional briefing likewise recognizes the applicability of the full breadth of state property law to the background-principles inquiry.

In the post-*Lucas* era, courts have applied the background-principles defense to the full range of common-law principles, including the Public Trust Doctrine. The New Jersey Supreme Court substantially adopted a lower court's application of the Public Trust Doctrine as a background principle to reject a takings challenge brought by owners of tidelands to the State's denial of a permit to build a dock. *See Karam v. New Jersey*, 723 A.2d 943 (N.J. 1999), *aff'g* 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998). A Florida appeals court used the Public Trust Doctrine to reject a takings challenge to prohibitions on offshore drilling because the doctrine permitted the legislature "to protect the lands held in trust for all the people." *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 624 (Fla. Ct. App. 1997). Other decisions issued prior to *Lucas* use an analysis compatible with the background-principles defense to show that a public-trust servitude defeats a takings challenge to the exercise of that servitude. *See Wilson v. Massachusetts*, 583 N.E.2d 894, 901 (Mass. App. Ct. 1992) (if "the coastal areas in question are impressed with a public trust * * *, the plaintiffs, from the outset, have had only qualified rights to their shoreland" and thus would have no takings claim), *aff'd*, 597 N.E.2d 43 (Mass. 1992); *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 723 (Cal. 1983) (concluding that the enforcement of a public trust does not constitute a taking because it does not "divest anyone of title to property").[8]

[8] For a comprehensive discussion of many other cases that rely on background principles to reject regulatory takings claims, see Glenn P. Sugameli, Lucas v. South Carolina Coastal

For the reasons set forth above and by the Coastal Council, South Carolina common law precludes McQueen from owning the property interest alleged to have been taken and thus absolves the State from compensating McQueen under the Takings Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and judgment should be entered for the Coastal Council.

Respectfully submitted,

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Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 Envtl. L. 939 (1999).