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Supreme Court of the United States.

CCA ASSOCIATES, Petitioner,
v.
UNITED STATES, Respondent.

No. 11-1352.
June 11, 2012.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

Brief Amicus Curiae of The National Federation of Independent Business Small Business Legal Center, The Cato Institute, and the Center for Constitutional Jurisprudence

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*i QUESTIONS PRESENTED

1. In conforming to the "parcel as a whole rule" propounded in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), does *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002) require conflation of permanent and temporary losses, thereby essentially destroying the requirement that government must pay for temporary takings damages as set forth by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987)?

2. Under *Penn Central's* multifactor inquiry for establishing partial regulatory takings, the Court has identified three factors as "relevant considerations." Should individual factors be weighed so heavily, or defined so narrowly, as to foreclose all temporary taking claims, or should *Penn Central's ad hoc* balancing test be construed more flexibly so that societal burdens are borne by the public when required by justice and fairness?

3. Did the United States effect a temporary regulatory taking under *Penn Central*, when it imposed restrictions that revoked Petitioner's contractual rights, forcing Petitioner to house government selected or approved members of the public, at below market rates, for a five-year period, during which time Petitioners suffered a loss of over 81 percent ($700,000) in net income?

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*1 INTEREST OF AMICI CURIAE [1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), the Cato Institute (Cato) and the Center for Constitutional Jurisprudence submit this brief amicus curiae in support of Petitioner's, CCA Associates, Petition for Writ of Certiorari.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a *2 "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cages that will impact small businesses. The Legal Center files in this case because many small businesses own property, and often suffer economic losses when land use authorities impose burdensome regulatory restrictions. As such, small business owners are particularly interested in the regulatory takings doctrine, and in ensuring that this Court offers predictable and workable rules to guide the lower courts in the takings inquiry.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case is of central concern to Cato because it implicates property rights, which are foundational to a free society.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the *3 American Founding to their rightful and preeminent authority in our national life, including the protections for private property - considered by the Founders to be the cornerstone of individual liberty. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Stop the Beach Renourishment v. Florida Department of Environmental Protection,* 560 U.S. 2606 (2010), *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163 (2009), and *Kelo v. City of New London, Conn.,* 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

This takings case concerns the federal government's decision to abrogate contractual rights that it had explicitly recognized but subsequently found inexpedient. In order to ensure low- and moderate-income housing, Congress bound Petitioner to a new regulatory regime, [2] mandating that it allow federally selected members of the public to occupy its property at below market rates. The Court of Federal Claims determined that this caused the owner to lose 81.25 percent (over $700,000) of return on its equity over the five-year period that the regulation was in force. The Petitioner, CCA *4 Associates seeks just compensation

under the Fifth Amendment and twice prevailed in the Court of Federal Claims. The Federal Circuit reversed, however, holding in substance that CCA Associates could not have suffered a taking because the regulatory imposition was only temporary. More specifically, the Federal Circuit concluded under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978), that no taking had occurred because $700,000 in lost revenues over a five-year period represented only a small fraction of the property's total earning potential over the course of its full life. This rationale would effectively bar all temporary regulatory takings claims because temporary lost earnings will inevitably represent only a narrow fraction of the potential economic yield from a property over its long or indefinite lifespan.

CCA Associate's petition for *certiorari* should be granted in order to clarify and make more predictable the compensability of temporary regulatory takings that this Court first addressed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987). The contradictory Federal Circuit opinions in this case demonstrate the need for this Court's guidance. In addition to the importance of establishing consistency in federal and state court decisions, this Court should grant *certiorari* in order to vindicate the principles of "fairness and justice" that animate the Takings Clause. *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

"The major problem that bedevils" takings law is that the Court "has refrained from articulating usable rules that might enable lower court judges ***5** and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion." Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York,* 13 Wm. & Mary Bill of Rts. J. 653, 683 (2005). Indeed, there is a tremendous need for clarification and predictability because landowners - like the small business in this case - need to be able to accurately assess the likelihood of prevailing in a takings claim. After bearing heavy economic losses from regulatory impositions, few landowners can afford to continue forward with the high costs of litigation if the potential for prevailing in an inverse condemnation claim cannot reasonably be assessed. Likewise, without further guidance from this Court, regulators are left with little help in assessing potential takings liability from contemplated governmental actions. During this time of economic uncertainty these concerns are all the more pressing, and underscore the national importance of granting *certiorari* in this case.

REASONS FOR GRANTING THE PETITION

I. SYSTEMIC CONFUSION PREDOMINATES AS TO WHETHER *TAHOE-SIERRA* VITIATES *FIRST ENGLISH*

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), this Court held that a regulation that worked a regulatory taking could be withdrawn, but that a claimant would be entitled to just compensation for the period the regulation was in effect. Yet, *First* ***6** *English* addressed only temporary takings remedies and did not consider what constitutes a temporary taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), later explained that courts must resort to the *ad hoc* test set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978) to determine whether a temporary taking has occurred; however, new and vexing questions abound as to whether *First English* remains viable.

a. Courts Have Struggled to Define the Relevant Parcel

The bedrock of the regulatory takings doctrine has been that "the 'Fifth Amendment's guarantee… [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Penn Central,* 438 U.S. at 123 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). As such, the Court enunciated the "parcel as a whole" rule in *Penn Central*, stating that "[t]akings jurisprudence does not divide a single parcel into discreet segments… [but instead looks to the impact of the regulation on] the parcel as a whole." *Id.* at 130-31. As explained in *Tahoe-Sierra*, the parcel as a whole rule is necessary to ensure a fair analysis because otherwise property owners could claim a regulation has resulted in a complete devaluation of their property by "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra,* 535 U.S. at 331; *see also* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988).

***7** Yet concerns about litigants expediently defining the relevant parcel can cut both ways. While "a taking can appear to emerge if the property is viewed too narrowly," it is just as true that "[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined." *Ciampitti v. United States,* 22 Cl. Ct. 310, 318-19 (1991). Here, the United States argued that the parcel as a whole rule should be applied to minimize the apparent economic impact of the Preservation Statutes over the course of the property's full life, notwithstanding the fact that Congress had established the relevant time period when it decided the duration through which the Preservation Statutes would remain in effect. As such, concerns about overreaching by claimants are not supported in this case.

As demonstrated here, courts have struggled in defining what constitutes a parcel as a whole. *See Giovanella v. Conservation Comm'n of Ashland,* 857 N.E.2d 451, 456 (Mass. 2006) ("Repeated admonitions to use the 'parcel as a whole' … do little to define the contours of that whole parcel in any particular case."). In the absence of an objective and comprehensive notion of "parcel as a whole," courts typically take "a flexible approach, designed to account for factual nuances in determining the relevant parcel." *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1181 (Fed. Cir. 1994); *see also* Dwight H. Merriam, *Rules for the Relevant Parcel,* 25 U. Haw. L. Rev. 353 (2003); Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structual Approach for Determining When the Government Has Gone Too Far*, 2008 B.Y.U.L. Rev. 623. "[T]akings precedent has yielded a number of factors that bear on the [relevant parcel] inquiry…" ***8** Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 Vt. L. Rev. ___ (forthcoming 2012) [3] ; *see Lost Tree Village Corp. v. United States,* 100 Fed. Cl. 412, 427-428 (2011) (positing as many as six potential factors); *Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851, 860 (Cal. 1997) (noting ten additional factors).

b. This Court Should Clarify Whether *Tahoe-Sierra* Was Intended to Vitiate Temporary Takings by Conflating Them with Permanent Takings

The "parcel as a whole" doctrine remains particularly unsettled with respect to temporal segmentations because it is unclear whether *Tahoe-Sierra* was intended to vitiate temporary takings by conflating them with permanent takings. Much of this confusion turns on the fact that in *Tahoe-Sierra* the plaintiffs did not actually assert a partial regulatory taking that would lead to the application of a *Penn Central* analysis. Instead they asserted only a *per se* takings claim under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). This Court rejected that claim, stating that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra,* 535 U.S. at 332. Accordingly, lower courts have greatly struggled in trying to determine what role the parcel as a whole rule ***9** should play in a *Penn Central* analysis for temporary takings claims. Indeed, the dramatically conflicting Federal Circuit decisions leading to this Petition are emblematic of the systemic problems vexing the lower courts.

Here the *Cienega VIII* and *Cienega X* panels wildly disagreed as to whether *Tahoe-Sierra* permitted the court to independently examine the damages incurred during the five-year regulatory imposition. *See Cienega Gardens v. United States,* 331 F.3d 1319, 1344 (Fed. Cir. 2003) (*Cienega VIII*) (Focusing on the "total and immediate" impact of the Preservation Statutes); *but see Cienega Gardens v. United States,* 503 F.3d 1266, 1281 (2007) (*Cienega X*) (Ignoring the distinction between a categorical *Lucas* taking and a partial *Penn Central* taking, stating that, in "*Tahoe-Sierra*, the necessity of considering the overall value of the property was explicitly confirmed in the temporary regulatory takings context."). As expounded in *CCA Assocs. v. United States,* 667 F.3d 1239, 1246 (2011) (*CCA*), the difference between the two approaches is of tremendous practical importance. "Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the Court's application of the parcel as a whole rule in the economic impact analysis." *Id.*

***10 c. In the Wake of *Tahoe-Sierra*, This Court Should Clarify *Penn Central's* Requirement That Owners Must be Allowed a "Reasonable Return"**

While *Penn Central* discussed the need for landowners to obtain a "reasonable return" on their investments, it did not define that term. *Penn Central,* 438 U.S. 104 at 149 (Rehnquist, J., dissenting). Justice Rehnquist noted in his dissent the "[d]ifficult conceptual and legal problems posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property." *Id.* Rehnquist added that this Court would eventually need to define what constitutes a "reasonable return" for various types of property, and that the Court must further "define the particular property unit that should be examined…" *Id.* In the wake of *Tahoe-Sierra*, the lower courts are struggling with this very issue. Here the Federal Circuit stated: "If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to a severe economic deprivation when compared to our prior regulatory takings jurisprudence." *CCA,* 667 F.3d at 1247. Since an understanding of the right of *reasonable* economic returns is fundamentally vital to two of the three *Penn Central* tests - the "economic impact of the regulation on the claimant," and also "the extent to which the regulation has interfered with distinct investment-backed expectations" - this issue is of nationwide importance. *See Penn Central,* 438 U.S. at 124.

*11 II. IN MECHANICALLY APPLYING ITS RELEVANT FACTORS, THE FEDERAL CIRCUIT'S DECISION CONTRAVENES *PENN CENTRAL*

a. The Federal Circuit's Decision Contravenes *Penn Central* in Treating its Relevant Considerations as Talismanic

A regulation - though validly enacted - may amount to a compensable taking under the Fifth Amendment if it goes "too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). "In determining how far is too far, there is no 'magic number,' and 'no set formula.' " *CCA Assocs. v. United States,* 91 Fed. Cl. 580, 618 (2010) (internal citations omitted). *Penn Central* provides that there are *at least three* relevant considerations: (1) the "economic impact" of a regulation, (2) the property owner's "investment-backed expectations," and, (3) the "character of the government act." *Penn Central,* 438 U.S. at 124. But other factors may be relevant as well, depending upon the facts and circumstances of a given case. Indeed, there is nothing talismanic about the three identified factors; in an *ad hoc* balancing test they should be factored in and weighed along with other relevant considerations. *Id.* at 123. In this case, however, the Federal Circuit applied the factors inflexibly and mechanically, thus contravening *Penn Central's ad hoc* balancing approach.

*12 b. The Economic Impact of the Regulations Should be Determined With Reference to the Temporary Taking of Income-Producing Property.

In *Cienega X*, the Federal Circuit forged a rule limiting *Penn Central's* economic impact analysis in temporary takings cases so as to take into account lost potential earnings only in the context of a property's full life. The *CCA* panel regarded itself as bound to apply that rule. *CCA,* 667 F.3d at 1242. The Federal Circuit thus effectively forecloses all temporary takings claims because, no matter how severe or burdensome a temporary restriction might be, its economic impact will necessarily represent only a small fraction of the property's full potential economic utility, as measured over the course of its long or indefinite life. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central,* 38 Ecology L.Q. 731, 746 (2011). This analytical rule, as postulated in *Cienega X* and confirmed in *CCA Associates*, rejected *Cienega VIII's* formula which would have allowed the district court to consider the severity of the burden imposed over the course of the imposition.

As explained by the Federal Circuit in *CCA,* "Applying an analytical approach previously affirmed by this court in *Cienega VIII*, the trial court initially found an 81.25% diminution in return on equity as a result of the five years that the preservation statutes prohibited prepayment." *CCA Assocs.,* 667 F.3d at 1244. This return on equity approach compared the return on equity under the Preservation Statutes with the return on equity CCA *13 would have received but for the Preservation Statutes. *Id.* "In *Cienega X*, however, we held that any economic impact must be evaluated with respect to the value of the property as a whole, and not limited to the discrete time period that the taking was in force." *Id.* "[*Cienega X's*] language would require experts to evaluate the economic impact of a temporary loss of income during the taking period with data beyond the end of the taking to prove that the loss *during* the temporary taking period eviscerates the plaintiff's economic prospects for all time to come." William W. Wade, *Federal Circuit's Economic Failings Undo the Penn Central Test*, 40 Envtl. L. Rep. News & Analysis

10914, 10920 (2010). The Federal Circuit has quite simply mandated a rule to dilute the severity of the actual burden suffered. This cannot be squared with *Penn Central* or *Armstrong. See Penn Central,* 438 U.S. at 123.

c. Petitioner's Investment-Backed Expectations Should be Discerned in Light of Whether its Subjective Goals are Objectively Reasonable

In *Penn Central*, the Court spoke of "distinct investment-backed expectations." 438 U.S. at 124. A year later, that language was changed, without explanation, to "reasonable investment-backed expectations." *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). It may make sense for courts to discount intentions that are grandiose or implausible; however, markets are comprised of property owners and investors who have many different views of how to achieve success. In that context, this Court should review the heavy burden the Federal Circuit has placed on property owners to ***14** offer evidence demonstrating that their investment-backed expectations were not only reasonable, but also comported with expectations generally prevailing in the real-estate investment industry. *CCA Assocs.,* 667 F.3d at 1247-48. Granting *certiorari* in this case would clarify whether *Penn Central* requires investors to hold entirely orthodox business plans, or whether varying reasonable plans may suffice.

d. The "Character of the Regulation" Factor is of Overwhelming Relevance

The Court of Federal Claims accepted the government's contention that the Preservation Statutes furthered an important government objective, but spurned the assertion that this shielded the statutes from having the character of a taking. "[T]his court rejected that argument because the statutes 'did not place the burden of maintaining low-income housing on all taxpayers, but instead targeted only the owners of low-income housing whose regulatory agreements included the right to prepay their mortgages after twenty years.' " *CCA Assocs.,* 91 Fed. Cl. at 602 (quoting *CCA Assocs. v. United States,* 75 Fed. Cl. 170, 189 (2007)). The Federal Circuit concurred with this analysis. It also agreed - with the conclusion of the Court of Federal Claims that "the character of the government action is not such as to deliver the dispositive blow that CCA has hoped, [although] it nonetheless weighs in favor of a finding of a regulatory taking." *CCA,* 667 F.3d at 1248 (quoting *CCA,* 91 Fed. Cl. at 602).

***15 i. The Preservation Statutes Represent Narrow Targeting in the Furtherance of a Specific Government Program**

The Court of Federal Claims has recognized "targeting" as a character of a regulation supporting a compensable taking in the past. *See American Pelagic Fishing Co. v. United States,* 49 Fed. Cl. 36 (2001), *rev'd on other grounds*, 379 F.3d 1364 (Fed. Cir. 2004) ("The acts could not have achieved their objective any more fully if [the plaintiff's vessel at which they were directed] had been identified by name in the text of the acts. The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking.") *Id.* at 50-51. Likewise, Justice O'Connor's opinion in *Eastern Enterprises* suggests a similar analysis:

> "[T]he nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable… When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates ***16** fundamental principles of fairness underlying the Takings Clause… [W]e conclude that the Coal Act's application to Eastern effects an unconstitutional taking."

Eastern Enters. v. Apfel, 524 U.S. 498, 537 (1998) (plurality opinion).

Here, Congress did not attempt to alleviate a housing shortage by encouraging construction, or by imposing a general tax, or even by placing burdens on residential landlords generally. Rather it imposed heavy burdens on an extremely narrow group of property owners, those who had contracted with it to build housing subject to restrictions that were about to expire. In choosing its path, Congress was aware that it was "unilaterally abrogating a contract, which has been adhered to by one party for 20 years." *CCA,* 91 Fed. Cl. at 595 (quoting 136 Cong. Rec. 26, 372 (1990) (statement of Senator Heflin). Unlike typical regulations, this regulation unambiguously commandeered Petitioner's property for a government purpose.

The Preservation Statutes do not comport with the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation…" *Armstrong,* 364 U.S. at 49 (1960). That protection "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* By commandeering their property for low-income housing, Petitioners have been singled out and forced to bear such public burdens. The Preservation ***17** Statutes' very purpose was to shift the burden of providing public housing onto select property owners.

Yet the extent to which courts may place particular weight on the character prong remains an unsettled question. In *Kafka v. Montana Dep't. of Fish, Wildlife and Parks,* 201 P.3d 8, 32 (Mont., 2008) the Montana Supreme Court placed near dispositive weight on the character prong. Similarly, in other cases courts have given dispositive weight to other factors. *See e.g., Guggenheim v. City of Goleta,* 638 F.3d 1111, 1120 (9th Cir. 2010) (holding that the investment-backed expectations prong was fatal to Guggenheim's claim, notwithstanding severe economic losses). Yet Justice O'Connor's concurrence in *Palazzolo*, warning against "[t]he temptation to adopt what amount to per se rules," and noting that the "Takings Clause requires careful examination and weighing of all the relevant circumstances[,]" suggests uncertainty as to when a reviewing court may properly give controlling weight to a particular factor. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 633-35 (2001). Therefore, a grant of *certiorari* is needed to clarify whether - under egregious circumstances - the "character of the regulation" test may be given the heightened status that the facts would suggest, or whether the character prong must be given equal weight with the other factors in all cases.

*18 ii. The Preservation Statues are Not Akin to Traditional Rent Control

It would be extravagant for the Court to discount the importance of the character prong in this case because of invocation of rent control precepts. This Court's approval of rent control has been predicated on the supposition that such laws "merely regulate petitioners' use of their land by regulation [of] the relationship between landlord and tenant." *Yee v. City of Escondido,* 503 U.S. 519, 520 (1992). In the instant case, however, the government did not superimpose regulation upon an existing landlord-tenant agreement. Indeed, the whole purpose of the government's contract with Petitioner was to induce it to produce housing where none existed, and to populate its property, at the outset and thereafter, with tenants approved by the government. Also, the Escondido ordinance did not on its face require that the owner remain in the rental business, *Yee,* 503 U.S. at 527-28, whereas the Preservation Statutes have such an affirmative requirement. *See CCA Assocs.,* 91 Fed. Cl. at 585 (Owners were required to "manage the properties in accordance with HUD guidelines… and sell the property only upon HUD's approval."). In essence, Petitioner entered into a contract with the government obligating them to supply housing to the government's designees, on terms approved by the government, during the duration of the mortgage. In that sense, the actual residents were more akin to sublessees than to tenants of the landlord. Petitioner had no inkling that the government would unilaterally modify its agreement to obtain wholesale housing for a specifically limited period.

*19 III. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE NATIONWIDE IMPORTANCE OF BRINGING CLARITY AND PREDICTABILITY TO THE TAKINGS DOCTRINE FOR THE BENEFIT OF LANDOWNERS AND REGULATORS ALIKE

a. Scholars Invariably Agree that the *Penn Central* Balancing Test Lacks Clarity and Predictability

The Court has referred to *Penn Central* as the "polestar" of the regulatory takings inquiry, *Palazzolo,* 533 U.S. at 633 (O'Connor, J., concurring), and *Tahoe-Sierra,* 535 U.S. at 336; however, after thirty-two years the *Penn Central* test remains shrouded in a "formless, directionless haze." Radford & Wake, *supra* at 735; Kanner, *supra* at 682-683. From this "doctrinal fog," all that is clear is that - theoretically - a taking occurs when a property owner has been forced to bear a burden which in all fairness and justice should be borne by the public as a whole, *Armstrong,* 124 U.S. at 49, and that there are at least three "relevant considerations" in determining whether such a burden has been imposed on a property owner. *Penn Central,* 438 U.S. at 124; Radford & Wake, *supra*, at 735; *see also* Kanner, *supra* at 690.

Yet even with regard to those three considerations, scholars have noted an utter lack of direction from the outset. "[*Penn Central*] is virtually silent as to what sort of considerations [the 'character of the government action'] was meant to encompass[,] is virtually silent as to how [the ***20** economic impact] prong should be evaluated and weighed [and] offers virtually no guidance as to precisely what counts as an investment-backed expectation…" *See Radford & Wake, supra* at 736, 738-739; *see also* John D. Echeverria, Making Sense of *Penn Central,* 23 UCLA J. Envtl. L. & Pol'y 171, 171-172 (2005). Moreover, to the extent that *Penn Central* offered any direction, others argue that subsequent decisions have rendered some of these factors impotent. *See* Joshua P. Borden, *Derailing Penn Central: A Post-Lingle, Cost-Basis Approach to Regulatory Takings*, 78 Geo. Wash. L. Rev. 870, 877 (2010) (Questioning *Penn Central's* continued viability in the wake of *Lucas,* 505 U.S. 1003, and *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)). With little to go on, commentators have offered innumerable competing theories for how the separate factors should be applied and weighed. The near invariable call for further guidance, and the fundamental disagreements among legal scholars as to how the regulatory takings test should be applied, reflects the conceptual gaps that this Court has left open, and illustrates the *tabula rasa* from which lower courts work in deciphering *Penn Central.* Radford & Wake, *supra* at 735.

b. *CCA Associates* is Emblematic of the Inconsistent and Contradictory Opinions Spawned in the Absence of Meaningful Guidance

The history of this case, including the voluminous and contradictory opinions in *CCA* and in the *Cienega Gardens* line of cases upon which it relied, demonstrates the unpredictability and the ***21** lack of guidance governing the regulatory takings test, as well as the tendency of lower courts to harden *Penn Central's ad hoc* balancing test into rigid mechanical rules. The wildly different analytical approaches embraced in these cases represent the embodiment of the intellectual chasm between various scholars who have offered radically different theories for how judges should fill in the blanks left unanswered in *Penn Central.* As such, this case is a particularly appropriate vehicle for this Court to address these fundamental questions bedeviling the takings doctrine.

c. Regulators and Landowners Across the Country Have a Great Interest in Bringing Clarity and Predictability to the Regulatory Takings Doctrine

For property owners the practical need for clarification and predictability is of paramount importance because their Fifth Amendment rights remain shrouded in doctrinal fog. Radford & Wake *supra* at 736 ("By not fleshing out the paradigm it created, the *Penn Central* Court muddled regulatory takings law to the point that land-use practioners and regulators alike are left virtually without guidance as to whether any given restriction may rise to the level of a taking."); Kanner, *supra* at 682-683. Without further guidance from the Supreme Court, landowners have no rational way to determine their potential for recovering just compensation in an inverse condemnation claim other than to roll the proverbial *Penn Central* dice. Kanner, *supra* at 683 ("U.S. Supreme Court has refrained from articulating usable rules that might ***22** enable lower court judges and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion."). For a typical landowner the costs of litigation cannot be justified when the takings test amounts to such a gamble, especially in light of decisions - as presented in this case - where the lower courts have endorsed mechanical rules which increasingly tip the odds in the government's favor. As such, clarification of the *Penn Central* test would help property owners make better decisions not only in deciding whether to advance an inverse condemnation claim, but also in helping them make prudent investment choices; this would encourage

businesses to invest in the real estate market and in development projects across the country. Kanner, *supra* at 681 ("[*Penn Central's*] aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be homebuilders, and an economic disaster for would-be home buyers and for society at large."); *see also Economics and the Rule of Law: Order in the Jungle, The Economist*, 83, Mar. 13, 2008. [4]

But the need for further guidance is equally important to government regulators, and to the taxpayers who must foot the bill when a taking occurs. Steven J. Eagle, *Some Permanent Problems With the Supreme Court's Temporary Regulatory Takings Jurisprudence*, 25 U. Haw. L. Rev. 325, 352 (2003). ("[E]mphasis on balancing tests gives … no one much predictability."). To avoid takings liability, government needs to be able to accurately assess its ***23** potential liability with each land use decision; however, it is difficult - if not impossible - to rationally assess taking liability when *Penn Central* and its progeny remain rudderless. Echeverria, *supra* at 175 ("If the Penn Central test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central.*") (emphasis added). These concerns are of heightened importance now as governments are struggling with budgetary problems at all levels. Andrew Taylor, *CBO: Deficit estimate for 2012 hiked to $1.2T*, Associated Press, (April 13, 2012) (In the "latest confirmation of the government's severe fiscal problems," the Congressional Budget Office estimates the government will run a $1.2 trillion deficit" this year.) [5] ; *see also* Richard Simon, *National League of Cities reports worsening finances for local budgets*, Los Angeles Times, (September 27, 2011). [6]

CONCLUSION

This Court should grant *certiorari* to resolve the systemic doctrinal confusion in the courts for the benefit of land use regulators and landowners alike.

Footnotes

1 Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of Court. In accordance with Rule 37.6, the NFIB Legal Center, the Cato Institute and the Center for Constitutional Jurisprudence state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the briefs preparation or submission.

2 The Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, Sec. 202, 101 Stat. 1877 (1988) (ELIHPA), and the Low-Income Housing Preservation and Resident Homeownership Act, Pub. L. No. 101-625, 104 Stat. 4249 (1990) (LIHPRHA) (collectively "Preservation Statutes") were enacted for the purpose of forcing Petitioner to house low-income families beyond its contractual obligation, knowingly revoking Petitioners contractual rights.

3 *available* at http://ssrn.com/abstract=1990357 (last visited 6/06/12).

4 *available online at* http://www.economist.com/node/10849115 (last visited 6/06/2012).

5 *available online at* http://news.yahoo.com/cbo-deficit- estimate-2012-hiked-1-2t-192323423.html (last visited 6/06/2012).

6 *available online at http://latimesblogs.latimes.com/ nationnow/2011/09/cities-finances-more-challenging-than-at- any-time-in-decades-.html* (last visited 6/06/2012).