No. __

IN THE

Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,

Petitioner,

v.

CITY OF CARSON AND CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), that determining whether regulatory action constitutes a taking requires balancing the character and extent of economic impact of the regulatory action on a party, the extent of interference of the regulatory action with a party's distinct investment-backed expectations, and the character of the regulatory action. And the Court held in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that the Seventh Amendment right to a jury applies to regulatory takings claims against municipalities.

The questions presented are:

1. Whether a regulation that causes a property temporary but substantial cash losses is immune as a matter law from regulatory takings scrutiny if these substantial cash losses do not cause a dramatic decrease in the total value of the property.

2. Whether an appellate court reviewing a jury verdict in a takings case is required to view the evidence in the light most favorable to that verdict.

PARTIES TO THE PROCEEDING

Petitioner is Colony Cove Properties, LLC, plaintiff-appellee in the court below.

Respondents are City of Carson and City of Carson Mobilehome Park Rental Review Board, defendants-appellants in the court below.

RULE 29.6 DISCLOSURE

Colony Cove Properties, LLC is wholly owned by El Dorado Palm Springs, L.P. as its sole member. James Goldstein is El Dorado Palm Springs, L.P.'s sole limited partner. Goldstein Properties, Inc. is the sole general partner of El Dorado Palm Springs, L.P., and is a privately held corporation. Goldstein Properties, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 888 F.3d 445 and reprinted in the Appendix to the Petition ("App.") at 1a-20a. The amended judgment of the district court is not reported, but is reprinted at App. 24a-27a.

JURISDICTION

The court of appeals issued its decision on April 23, 2018. App. 1a. The court denied rehearing on July 3, 2018. App. 21a. On September 18, 2018, the Chief Justice extended petitioner's time to file this petition until October 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND REGULATORY PROVISIONS

The relevant constitutional and regulatory provisions are reproduced at App. 28a-56a.

INTRODUCTION

In 2006, petitioner Colony Cove Properties, LLC purchased a rent-controlled mobilehome park in Carson, California using what is undisputed to be a commercially-reasonable mix of debt and equity. Colony Cove purchased the property in reliance on the then-existing rent-control regulations, under which property owners could seek rent increases sufficient to maintain constant operating income, and

under which interest payments on an acquisition mortgage would be considered an operating expense in determining the rent increase necessary to maintain operating income.

Soon after Colony Cove bought the Park, but just before it applied for rent increases, respondents changed the rules. Under the new rules, respondents would no longer consider interest on acquisition debt as an operating expense in determining whether a rent increase is warranted. The result was that Colony Cove was for several years allowed to increase rent at a dramatically lower rate than it would have expected when it purchased the property, and thus was required to operate during those years at massive cash losses that would have resulted in foreclosure absent Colony Cove's owner's intervention by making significant cash infusions totaling millions of dollars.

Colony Cove brought suit alleging a regulatory taking, and under *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), its claim was tried to a jury, which was asked to apply the three-part test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), for determining whether a regulatory taking has occurred. That test requires an "ad hoc" balancing of (i) the economic impact of the regulatory action, (ii) the extent of interference of the regulatory action with a party's reasonable investment-backed expectations, and (iii) the character of the regulatory action.

After hearing evidence that respondents' retroactive regulatory conduct caused Colony Cove massive

cash losses for several years, and testimony (including from respondents' own witness) that it would have been reasonable for Colony Cove at the time of the purchase to expect that acquisition debt interest expense would have been treated as an operating expense, the jury unanimously concluded that the respondents' action constituted a regulatory taking. The district court denied a motion for judgment notwithstanding the verdict, and separately confirmed the court's agreement with the jury that a taking had occurred.

The court of appeals held that the jury's verdict must be reversed as a matter of law. That decision presents two important legal questions concerning federal takings law that warrant this Court's review.

First, the court of appeals concluded that Colony Cove failed as a matter of law to establish *Penn Central*'s economic-impact factor because economic impact can only be calculated by showing that the challenged action caused a substantial diminution in the entire value of the property. Colony Cove failed to satisfy that requirement, the court held, because it only showed a temporary but substantial reduction in cash flow, but not a substantial effect on the property value as a whole. That rule eliminates temporary regulatory takings claims for fee-simple property owners within the Ninth Circuit—given the indefinite life of a fee-simple property, the court's rule precludes any takings plaintiff has from satisfying *Penn Central*'s economic-impact factor so long as the regulatory taking is temporary.

The court of appeals' rule is flatly inconsistent with this Court's jurisprudence, beginning with *First*

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), which held that regulations with temporary effect can constitute regulatory takings under *Penn Central*. And the rule creates a conflict with the Federal Circuit, which has expressly rejected the rule the Ninth Circuit adopted here, and has made clear that courts are *not* limited to considering diminution in the value of the property as a whole in measuring the economic impact of temporary regulatory restrictions on fee simples. *See CCA Assocs. v. United States*, 667 F.3d 1239, 1246-47 (Fed. Cir. 2011). This Court's review is warranted to restore uniformity to the manner in which economic impact is measured under the *Penn Central* test.

Second, the Ninth Circuit compounded its error by failing to show deference to facts found by a unanimous jury. For example, the Ninth Circuit concluded that a property owner in Colony Cove's position could not have had a reasonable expectation that the City would continue to consider interest on acquisition debt as an operating expense despite the City's *own witness's* concession that such an expectation would have been reasonable. The Court's disregard for the jury's verdict cannot be reconciled with this Court's holding in *Del Monte* that the "ad hoc, factual inquiries" central to regulatory takings claims are the responsibility of juries, not courts. The Ninth Circuit's disregard for this precedent and for the Seventh Amendment independently warrants this Court's review.

The petition should be granted and the decision below reversed.

STATEMENT OF THE CASE

A. Factual Background

1. Colony Cove owns a rent-controlled mobilehome park in Carson, California. The governing rent-control rules allow property owners to apply annually to respondents, the City of Carson and its Mobilehome Park Rental Review Board, for rent increases. Respondents, in their evaluation of rent-increase applications, follow Carson's rent control ordinance (the "Ordinance") and its supporting guidelines (the "Guidelines"). ER-581-94, 595-600, 675-76, 741-42; SER-17-18, 28-29.[1]

The Ordinance and Guidelines are aimed at balancing the need to allow property owners a fair return based on their operating expenses, while at the same time maintaining rents below market levels. ER-581-94, 595-600, 675-76, 741-42; SER-17-18, 28-29. To determine whether and to what extent a rent-increase application should be approved, staff analyze various expenses submitted by property owners and compare them against the property's income to determine what level of rents would provide the owner with a fair return. ER-581-94, 672-73, 741-42; SER-17-18, 28-29.

2. When petitioner purchased its mobilehome park in 2006, the Guidelines provided that one of the "allowable operating expenses" that would be consid-

[1] Citations to "ER" and "SER" refer to the excerpts of record and supplemental excerpts of records filed in the court of appeals. Citations to "DE" refer to district court docket entries in the underlying action.

ered in evaluating whether to grant a rent increase was acquisition debt service—that is, interest payments made on a loan to purchase the rent-controlled property—so long as "the purchase price paid was reasonable in light of the rents allowed under the Ordinance and involved prudent and customary financing practices." ER-584, 673-74; *see also* App. 34a-35a. This was significant because the principal method for evaluating a rent-increase application was to attempt to maintain the property's net operating income. ER-791-92; SER-82-84, 92. Thus, if interest expense on debt service is counted as an operating expense, a rent increase would be allowed to compensate the property owner for some or all of that debt service.

Six months after petitioner purchased the park, and before petitioner was permitted under the Ordinance to file its first rent-increase application, respondents amended the Guidelines to provide for a method of analysis that would disregard acquisition debt service. This method would still seek to maintain a property's operating income, but it would *not* count acquisition debt service as an operating expense. ER-601-03, 688-89, 742; *see also* App. 52a-53a. This means that, unlike the rule that applied at the time petitioner purchased the park, no rent increase would be granted to defray the cost of interest expense deriving from acquisition debt, even if both the purchase price and the amount of debt used to finance the acquisition were commercially reasonable.

Respondents applied the amended Guidelines to petitioner's rent-increase applications. It was un-

disputed that both the property's purchase price and its debt level were commercially reasonable. Yet in each application, respondents disregarded petitioner's acquisition debt service—debt service that would have been taken into account under the rules in effect when the property was purchased—and ultimately approved rent increases grossly insufficient to cover petitioner's annual operating expenses.

B. District Court Proceedings

In April 2014, Colony Cove commenced the underlying action against respondents in federal court in California. Colony Cove alleged that respondents' retroactive application of the amended Guidelines to Colony Cove's rent-increase applications resulted in a taking without just compensation in violation of the Fifth and Fourteenth Amendments. DE-1, ¶¶ 1-6; *see also* DE-34-1, ¶¶ 1-6. The district court twice denied respondents' motions to dismiss the as-applied regulatory takings claim. Respondents failed to move for summary judgment, and Colony Cove's claim was tried to a jury, which was asked to determine whether respondents' retroactive application of the Guidelines to Colony Cove's rent-increase applications constituted a regulatory taking under *Penn Central*.

1. A principal question under *Penn Central* is the economic impact of the challenged regulation. *See* 438 U.S. at 124. Colony Cove introduced undisputed evidence that the rent increases approved by respondents were not only insufficient to cover petitioner's operating expenses, but that respondents' refusal to count acquisition interest payments as an operating expense caused Colony Cove to suffer cash

operating losses of nearly $2 million between the time of purchase and respondents' decision on the second rent-increase application. ER-692; SER-33, 41-44, 46-51. Petitioner's expert appraiser testified that such substantial operating losses raised the risk of foreclosure on the property, SER-62-64—a result that was forestalled only because Colony Cove's owner, James Goldstein, infused additional cash into the property.

2. Another critical question under *Penn Central*—and the question principally contested at trial—was whether Colony Cove expected at the time of its investment that acquisition debt service would count as an operating expense, and whether this expectation was reasonable. *See* 438 U.S. at 124.

Colony Cove's owner, James Goldstein, testified that when he purchased the property, he believed respondents would consider acquisition debt service in evaluating rent-increase applications, based on the stated purpose and language of the Ordinance and Guidelines, his extensive experience with respondents in connection with applications for other rent-controlled properties in Carson, and contemporaneous court decisions recognizing respondents' consideration of debt service. ER-673-79, 693; SER-16-23.

Crucially, respondents' own witness—the only past or present employee of the City or the Board to testify—testified that respondents almost always considered debt service and that it would have been "reasonable" for someone who purchased a rent-controlled property in 2006 to believe that respondents would grant rent increases sufficient to cover

operating expenses, including acquisition debt service. ER-791-92; SER-78-79, 82-84.[2]

3. After hearing the evidence, the jury returned a unanimous verdict in petitioner's favor, concluding that respondents' treatment of petitioner's rent-increase applications constituted a regulatory taking. DE-194 at 1. The jury concluded that petitioner was entitled to $3,336,056 in damages, but did not award prejudgment interest. *Id.* at 2.

On May 16, 2016, the district court entered judgment on the jury's verdict. DE-200. On August 25, 2016, the district court entered an amended judgment. *See* App. 24a-27a. The Court rejected as a matter of law the jury's 0% pre-judgment interest finding, and imposed a prejudgment interest recommended by respondents' expert. DE-222; *see also Schneider v. Cty. of San Diego*, 285 F.3d 784, 791-92 (9th Cir. 2002) (prejudgment interest in takings case jury issue). The court also rejected respondents' motion to set aside the verdict, not only rejecting respondents' legal arguments and challenges to the sufficiency of the evidence, but also emphasizing

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[2] The *Penn Central* test also asks the fact finder to consider the character of the government conduct. *See* 438 U.S. at 124. Here, not only did respondents' regulatory action retroactively apply to Colony Cove alone, but Colony Cove offered evidence of Mr. Goldstein's history of contentious battles with respondents; the fact that respondents offered other property owners relief not made available to petitioner here in connection with its rent-increase applications; and that Carson's mayor at the time of petitioner's rent-increase applications had a history of attempting to control or pressure members of the Board to vote against rent increases. ER-774-76; SER-16-18, 73-76, 119-21.

that "[h]aving independently weighed and considered the evidence, the Court agrees with the jury's finding that a taking occurred, as well as the amount of damages that the jury awarded subject to the Court's post-trial motion awarding prejudgment interest." App. 22a-23a.

C. The Court Of Appeals' Decision

The Ninth Circuit reversed the jury's verdict, concluding that respondents were entitled to judgment as a matter of law because petitioner had failed to proffer sufficient evidence at trial to support a regulatory taking under *Penn Central*. App. 9a-20a.

1. The court of appeals' principal ground for reversal was that the *Penn Central* economic-impact factor can "be determined only by comparing the [property's] post-deprivation value to [its] pre-deprivation value." App. 11a. In particular, the court held that a plaintiff can demonstrate economic impact—at least for a fee-simple property generating cash flow in perpetuity—only by offering evidence "compar[ing] the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value)." App. 12a-13a (citing *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007)). And because Colony Cove did not present evidence of the "post-deprivation value of the Property"—i.e., the discounted value of the total cash flows generated by the property over its entire useful life—the court of appeals held that a reasonable jury could not con-

clude that the economic-impact factor favored petitioner. App. 12a-14a. The court of appeals also noted that the one estimate offered at trial that could be viewed as a diminution in total property value showed a 25% decrease, which the court found was "far too small to establish a regulatory taking" as a matter of law. App. 11a-12a.

2. The Ninth Circuit also concluded that insufficient evidence was presented at trial to permit a reasonable jury to conclude that the two other *Penn Central* factors weighed in petitioner's favor. App. 14a-20a. In so holding, the court of appeals did not credit certain evidence or testimony offered by petitioner at trial, including respondents' witness's testimony that it would have been reasonable for a property owner to believe that respondents would approve rent increases sufficient to cover operating expenses.

3. On July 3, 2018, the Ninth Circuit denied rehearing. App. 21a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider two questions of fundamental importance to regulatory takings jurisprudence.

First, the Court should review the court of appeals' determination that economic impact under *Penn Central* can only be analyzed by comparing the property's total value before the challenged regulation to its total value after the challenged regulation. That decision—which has the effect of eliminating the viability of temporary regulatory takings claims in the Ninth Circuit—is inconsistent with this

Court's precedent, and creates a conflict with the Federal Circuit, which has rejected the very rule that the Ninth Circuit adopted below. That suffices to warrant granting the petition, which presents an ideal vehicle to resolve the first question presented.

Second, the Court should grant certiorari to confirm that the Seventh Amendment jury trial right—including its protection against appellate reexamination of jury-found facts—applies in regulatory takings cases. The Court so held in *Del Monte*, but the decision below does exactly what the Seventh Amendment and this Court's precedents preclude: it resolves factual questions, including credibility disputes, that have already been considered by the jury.

The petition should be granted.

I. THE COURT SHOULD RESOLVE WHETHER ECONOMIC IMPACT UNDER *PENN CENTRAL* CAN ONLY BE MEASURED BASED ON A REDUCTION IN TOTAL VALUE OF THE PROPERTY

The court of appeals held that economic impact under *Penn Central* can only support a finding that the government action has taken property through regulation if the regulatory conduct causes a substantial diminution in value of the property as a whole—meaning that a showing of severe but temporary negative economic impact can never suffice to demonstrate the requisite economic impact. That holding is flatly inconsistent with this Court's precedent. It creates a decisional conflict with the Federal Circuit, which has squarely rejected the rule adopted

below. And this is an ideal vehicle for resolving the question presented.

A. The Decision Below Is Inconsistent With This Court's Regulatory Takings Precedent

1. a. The Takings Clause of the Fifth Amendment does not prohibit the taking of private property, but instead places a condition on the exercise of that power. In other words, the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 314-15; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) ("[A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

As early as the 1870s, the Court held that the Fifth Amendment reached "direct appropriation[s]" of property, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870), and government action approximating a "practical ouster of [the owner's] possession," *N. Transp. Co. v. Chi.*, 99 U.S. 635, 642 (1878). *See also Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (taking under the Fifth Amendment where government dam permanently flooded plaintiff's property).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court recognized that the Takings Clause reached not only direct, physical impositions on private property, but also indirect, regulatory burdens. This recognition of regulatory takings flowed from the same foundational principles that supported creating a just compensation requirement in the first place. As Justice Holmes explained:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Mahon, 260 U.S. at 415. Thus, the Court recognized that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Mahon*, 260 U.S. at 414-15). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415.

From *Mahon* to the present, the Court has "eschewed any set formula for determining how far is too far." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (citing *Lucas*, 505 U.S. at 1015); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) ("In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules."). Instead, the Court has "identified several factors that have particular significance" in the inquiry into whether a particular government regulation "goes too far," including "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Central*, 438 U.S. at 123-24.

Regulatory takings require a "careful examination and weighing of all the relevant circumstances," *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring), when engaging in the "essentially ad hoc, factual inquiries" at the heart of the regulatory takings analysis, *Penn Central*, 438 U.S. at 124. The "touchstone" of these factual inquiries is to identify "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

b. The Court has also recognized that this rationale applies equally to *temporary* regulatory takings—i.e., regulations that are the functional equiva-

lent to a temporary rather than permanent appropriation of private property.

In *First English*, the Court first recognized that a temporary regulation may result in a taking requiring the payment of just compensation. The Court observed that where a regulation that worked a taking could be withdrawn, a property owner would be entitled to just compensation for the period the regulation was in effect. 482 U.S. at 318-19 ("'[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. . . . Where th[e] burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during th[e] period [the regulation was in effect].") (citations omitted).

The Court understood that temporary takings claims may limit the government's power to regulate property, but explained that such limitations were mandated by the Constitution in order to ensure a meaningful protection for private property owners:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the pro-

> visions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Id. at 321-22 (quoting *Mahon*, 260 U.S. at 416).

The temporary regulatory takings analysis, moreover, is no different in kind from a permanent regulatory takings analysis. This Court made that clear in *Tahoe-Sierra*, concluding that *Penn Central*'s three-factor test supplied the correct "approach [for] claims that a regulation has effected a temporary taking," because that approach permitted "careful examination and weighing of all the relevant circumstances." 535 U.S. at 333-36 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J. concurring)). That means that the *Penn Central* test, including its economic-impact factor, cannot be construed in a manner that would preclude the viability of temporary regulatory takings claims.

2. The decision below is fundamentally irreconcilable with this Court's precedent in two related respects.

a. First, the Court's conclusion that a regulatory taking can *only* be demonstrated by showing that the regulation had a substantial negative impact on the

value of the property as a whole is inconsistent with the Court's insistence on a flexible analysis tailored to the circumstances. After all, the ultimate inquiry is whether the challenged "regulatory actions" are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. To be sure, sometimes the best way to show this functional equivalence will be by showing that the regulation has substantially decreased the property's value. *See, e.g.*, *Palazzolo*, 533 U.S. at 625; *Olson v. United States*, 292 U.S. 246, 255 (1934).

But sometimes, a regulation will be the functional equivalent of a classic taking even if it does not cause a significant diminution in the value of the property as a whole. For example, everyone agrees that a city could not simply occupy an income-producing property for two years without paying just compensation, even if it gives the property back after the two years have gone by. That would be a *per se* taking, even though a two-year loss of income over the life of a property producing income in perpetuity would not be substantial. Yet under the Ninth Circuit's rule, a city could achieve the "functionally equivalent" result, *Lingle*, 544 U.S. at 539, by imposing regulations that make it "commercially impracticable," *Mahon*, 260 U.S. at 414, to operate the property for two years.

That result is nonsensical, but it is exactly the rule the Ninth Circuit adopted here. It is entirely undisputed that respondents' retroactive regulation resulted in Colony Cove having to operate its proper-

ty at massive losses for several years—losses that could have resulted in foreclosure and shuttering of the business. *See supra* at 7-8. In other words, respondents' regulatory action made it "commercially impracticable" to continue operating the property, which "has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Mahon*, 260 U.S. at 414-15. Or, at least, a jury was entitled to so conclude.

That is precisely why this Court has repeatedly rejected "*per se* rules" or a "mathematically precise formula" for determining whether a regulatory taking has occurred. *Tahoe-Sierra*, 535 U.S. at 326 (quotation omitted). Any such *per se* rule would necessarily ignore the actual effects of a regulatory regime on a property owner. Courts must instead "allow careful examination and weighing of *all the relevant circumstances*" to determine whether a particular government action affects a taking, *id.* at 322 (quotation omitted) (emphasis added)—i.e., whether the government has achieved through regulation the functional equivalent of a physical appropriation of property. The decision below is flatly inconsistent with this Court's mandated approach.

b. Second, the Ninth Circuit's rule cannot be reconciled with this Court's precedent concluding that regulations with temporary effect can result in a taking, and that this question is analyzed under the *Penn Central* test. Again, there is little question that if the state physically occupied a property for two years, and then returned it intact to its owner, the government's occupation, although temporary, would be a traditional physical taking requiring

payment of just compensation. And that is so even though the loss in rent or value for a fee-simple property during that physical occupation would be relatively small—the value of the property as a whole is determined by the discounted value of cash flows in perpetuity, so a loss of two-years' worth of cash flows will not substantially affect that value.[3]

Yet under the court of appeals' analysis, the government could achieve the functional equivalent of a two-year, temporary physical appropriation by regulation without having to pay just compensation—in the Ninth Circuit, if a municipality administered a regulatory scheme in a manner that deprived a rental property of nearly all rental income for the same two-year period described above, it would be able to avoid a takings challenge.

As a result, the Ninth Circuit's rule would virtually eliminate all temporary regulatory takings. This outcome simply cannot be reconciled with this Court's decisions recognizing that temporary takings can be affected not only by physical appropriation

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[3] As one commentator observed, under a rule that measured economic impact with respect to the "useful life" of a fee-simple property, like the one adopted by the Ninth Circuit below, a regulatory imposition on an income-producing property would need to exist for at least a decade before the diminution in income over the entire useful life of the property would be sufficient to support a taking. *See* David W. Spohr, Cleaning Up the Rest of Agins: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay," 41 Envtl. L. Rep. 10435, 10442 (May 2011); *see also id.* ("[T]he delay will likely need to extend over many years before the diminution approaches the 'tipping point'" sufficient to support a taking).

but also by regulation. *See First English*, 482 U.S. at 318; *see also Lucas*, 505 U.S. at 1032-33 ("If this deprivation amounts to a taking, its limited duration will not bar constitutional relief.") (Kennedy, J., concurring).

3. The Ninth Circuit appeared to believe that its contrary holding was required by the principle set forth in *Penn Central*, that "[t]aking jurisprudence does not divide a single parcel into discrete segments . . . [but looks to the impact of the regulatory action on] the parcel as a whole." 438 U.S. at 130-31; *see Tahoe-Sierra*, 535 U.S. at 331 ("[D]efining the property interest taken in terms of the very regulation being challenged is circular."); *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question"). The court of appeals took this to mean that the "relevant parcel" means the property over its entire useful life, which in turn means (the court believed) that courts are required to assess the economic impact of the challenged regulation on an income-producing property based on its effect over the entire useful life of the property.

Not so. "Temporary regulatory takings that involve lost income," like this case, "are fundamentally different from those that involve lost property . . . ." Laura J. Powell, The Parcel As A Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases, 89 Wash. L. Rev. 151, 168-69 (Mar.

2014). Where a regulation leads to a temporary loss of property, the property owner receives the same property at the end of the temporary taking and thus is "essentially made whole." *Id.* For income-producing properties like petitioner's, though, returning use of the property after the taking "does not return the income that was lost during the temporary taking" or the income-generating opportunity. *Id.*

Given this difference, "the relevant parcel in temporary takings cases involving lost income should not be treated the same as the relevant parcel in cases involving lost property." *Id.* at 169; *see also* William W. Wade, Ph.D., Temporary Takings, Tahoe-Sierra, and the Denominator Problem, 43 Envtl. L. Rep. 10189, 10199 (Feb. 2013). Instead, the relevant parcel should be determined by the owners' investment in the property, with economic impact being measured by the loss in income over the period of the taking. *See* Powell, 89 Wash. L. Rev. at 169. A contrary result would eliminate a plaintiff's ability ever to prove a temporary regulatory taking for income-producing property—a result that conflicts with this Court's jurisprudence for the reasons explained above.

B. The Decision Below Creates A Conflict With The Federal Circuit

The decision below is not only inconsistent with this Court's precedent, but also creates a conflict with the Federal Circuit—the court of appeals responsible for all takings claims against the United States—which has specifically rejected the "lifetime value" test adopted below.

In *CCA Associates v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), the Federal Circuit held that with respect to "temporary regulatory restrictions on fee simples," like this one, courts do not consider "all income earned over the entire remaining useful life of the real property [as] the denominator." 667 F.3d at 1247. The court explained that such an approach, first set forth in its prior *Cienega Gardens* case, was limited to a narrow set of takings claims challenging two federal low-income housing statutes. *Id.* But applying that analysis beyond that limited sphere would deviate from the "traditional" method of analyzing economic-impact under *Penn Central*, which measures "the impact the regulation had on the property during the time it was in effect, such as the amount of money the plaintiffs actually lost in rents during that time period." *Id.* at 1246.

The *CCA* court further observed that this departure from the traditional method for analyzing economic impact—i.e., the test adopted below—would substantially impact a takings plaintiff's ability to establish a sufficient economic impact to support a claim. As that court explained, "[i]f the net income over the entire remaining life of the [property] is the denominator[,] there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to severe economic deprivation" sufficient to support a claim. *Id.* at 1247. Because "the selection of the denominator in these cases is going to determine the severity of the economic impact," the court observed that using the useful life of the property as the denominator "would virtually eliminate all [tem-

porary] regulatory takings" for income-producing fee-simple properties. *Id.*

This decisional conflict itself suffices to warrant this Court's review. Because the Federal Circuit considers all takings claims against the United States, the persistence of this circuit conflict will mean that the rules governing regulatory takings will differ depending on the sovereign that has promulgated the relevant regulation. That state of affairs is intolerable, and this Court's review is required to impose uniformity in this important area of takings jurisprudence.

C. This Case Is An Ideal Vehicle Through Which To Resolve The Question Presented

Finally, this case provides the Court a perfect vehicle to resolve the question presented. The temporary but severe cash losses caused by respondents' decision to retroactively refuse to treat acquisition debt service as an operating expense in analyzing rent-increase applications are undisputed. The Ninth Circuit held that these cash losses could not support a taking only because they did not cause a substantial deprivation of the total value of the property. If this Court were to reject that artificial rule in favor of this Court's traditional, flexible approach, there would no longer be any basis for concluding that the *Penn Central* economic-impact factor is not satisfied.

II. THIS COURT SHOULD ALSO CONSIDER WHETHER THE DEFERENTIAL STANDARD OF APPELLATE REVIEW GENERALLY APPLICABLE TO JURY TRIALS ALSO APPLIES IN TAKINGS CASES

This Court's review is also warranted because the court of appeals' decision is inconsistent with this Court's holding that regulatory takings claims are to be determined by juries, not courts.

1. a. The Seventh Amendment provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. This jury-trial right fundamentally prevents appellate reexamination of jury-found facts.

As Justice Story explained:

> At the time when the constitution was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury. And that the appellate jurisdiction of the supreme court, both as to law and fact, would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury.

United States v. Wonson, 28 F. Cas. 745, 750 (U.S. Cir. Ct. Mass. 1812) (No. 16,750). The Reexamination Clause was adopted specifically to assuage these

concerns that an appellate court would reexamine the facts once a jury had determined them. *See id.* (the "scope and object[ion]" of the Seventh Amendment addressed "apprehensions entertained of new trials by the appellate courts"); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 451-52 (1996) ("The Reexamination Clause put to rest 'apprehensions' of 'new trials by the appellate courts,' by adopting, in broad fashion, 'the rules of the common law' to govern federal-court interference with jury determinations. The content of that law was familiar and fixed. It quite plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence. At common law, review of judgments was had only on writ of error, limited to questions of law.") (Scalia, J., dissenting) (quotations and citations omitted).[4]

Consistent with this history, the Court has recognized that the Seventh Amendment does not per-

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[4] *See also* Laurence H. Tribe, Am. Constitutional Law, § 3-32, The Seventh Amendment Right to Trial by Jury as a Limit on Federal Judicial Power, at 624 (3d ed. 2000) (the history of the Reexamination Clause "reveals that it was adopted principally to protect jury verdicts from after-the-fact judicial interference, especially by appellate courts"); Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 472-73 (1989) (the framers had a "preference for local juries, who would be more familiar with the parties and witnesses, and thus in a better position to assess their credibility and character. Subsequent adoption of the . . . Seventh Amendment[], limiting appellate relitigation of facts found by a local jury, further illustrates the notion that appellate review was generally not seen as authorizing a 'new trial' by the appellate judges.") (citations omitted).

mit another court's review of facts found by the jury with no standard of deference and with the authority to redecide those matters in the first instance. *See Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379-80 (1913).

b. In *Del Monte*, the Court concluded that the Seventh Amendment guarantees a right to a jury trial in a takings case. And indeed, the Seventh Amendment's protections take on particular significance in the context of regulatory takings, because the determination of liability in such cases is defined by "'essentially ad hoc, factual inquiries,' requiring 'complex factual assessments of the purposes and economic effects of government actions.'" *Del Monte*, 526 U.S. at 720 (quoting *Lucas*, 505 U.S. at 1015; *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); *Penn Central*, 438 U.S. at 124). Appellate relitigation of a jury determination is thus particularly inappropriate in this context.

2. The court of appeals' approach to appellate review is incompatible with the Seventh Amendment and this Court's cases construing it. Throughout its opinion, the panel evaluated the facts, reweighed the evidence presented to the jury at trial, and made credibility determinations contrary to findings of the jury that heard the evidence firsthand.

Although the Court's erroneous approach to appellate review infected its entire opinion, the court's most glaring flaw concerned the Court's evaluation of *Penn Central*'s investment-backed expectations factor. The court of appeals concluded that, based on the evidence presented to the jury, "no objectively reasonable person" would have reasonably expected

that acquisition debt service would have been treated as an allowable operating expense in a rent-increase application. App. 18a. The Ninth Circuit so held even though Colony Cove's owner testified that he believed that acquisition debt service would have been treated as an allowable expense, and that this belief was based on his past experience with respondents and his general knowledge of respondents' conduct. App. 15a-16a. The court of appeals may not have believed Mr. Goldstein, but the jury obviously did, and that is all that matters when the Seventh Amendment applies.

Even more incredibly, the court found that no reasonable jury could have concluded that Colony Cove could have reasonably expected at the time of the purchase that acquisition debt service would have been treated as an allowable operating expense, even though respondents' *own witness* testified that such an expectation would have been reasonable. When Ken Freschauf, who at the time of the rent-control applications was the City employee in charge of the rent-increase process, testified under cross-examination that such an expectation would not have been reasonable, he was confronted with deposition testimony swearing to the exact opposite. ER-791-92; SER-78-79, 82-84. The jury was thus presented with a classic credibility question—was Mr. Freschauf telling the truth the first time or the second time. The jury obviously made that determination in Colony Cove's favor. The court of appeals' decision to overrule the jury's finding simply cannot be reconciled with the strictures of the Seventh Amendment.

As this Court has recognized, a plaintiff's Seventh Amendment right to a jury trial "should be jealously guarded by the courts," *Jacob v. City of N.Y.*, 315 U.S. 752, 752-53 (1942), and any attempt to interfere with that right should be closely scrutinized. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). The Ninth Circuit's unambiguous failure to consider evidence favorable to the jury's verdict not only violates petitioner's Seventh Amendment rights, but also is inconsistent with the factually-intensive analyses inherent in regulatory takings claims. This Court should grant certiorari and reaffirm its holding in *Del Monte* that the Seventh Amendment fully applies in the regulatory takings context.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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