No. 18-573

IN THE

Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,

Petitioner,

v.

CITY OF CARSON, CALIFORNIA, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a property owner can show a regulatory taking of its property without putting on any evidence of the value of that property either before or after the challenged regulatory action.

2. Whether the Court of Appeals properly applied the well-settled standard of review for denial of a motion for judgment as a matter of law after a jury verdict.

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INTRODUCTION

Petitioner Colony Cove chose to take on $18 million in debt to finance its $23 million purchase of a rent-regulated mobilehome park in the City of Carson, California. It made a highly leveraged bet that it could persuade the City's Mobilehome Rent Review Board to allow it to pass through more than $1.2 million in annual debt service to the residents of the park. The rent increases necessary to shoulder that debt burden would have been twice as large as the largest increase ever approved in the nearly 30-year history of mobilehome rent control in the City. The Board did grant Colony Cove rent increases—some of the largest ever awarded—but declined to allow it to pass through all of its debt service.

Colony Cove contends that the City took its property without just compensation in violation of the Fifth Amendment by granting it less than all of the increase it requested. State trial and appellate courts roundly rejected the contention that he was denied a fair return. But when the district court here gave a jury the task of applying the regulatory takings test from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), it found a taking.

On appeal, however, the Court of Appeals correctly recognized that Colony Cove had failed to put on any evidence—and in fact sought to *exclude* any evidence—of the impact of the Board's rent decisions on the value of its full property interest: the fee simple estate in the mobilehome park. This Court has made clear that such evidence is indispensable to show the

kind of severe interference with property rights that constitutes a taking.

The Court of Appeals followed the straightforward direction of this Court's takings cases. Its holding about the evidence necessary to show economic impact under *Penn Central* therefore presents no unsettled question of law that might warrant review. And nothing about the Court of Appeals' decision conflicts with the approach taken by any other circuit. Colony Cove cites a single Federal Circuit case, but relies solely on dictum. In its *holding*, by contrast, the Federal Circuit took precisely the same path taken by the Ninth Circuit here.

Although Colony Cove does not contest that the Court of Appeals correctly stated the standard of review for a jury verdict, Colony Cove argues the court failed to correctly apply that standard. But even if Colony Cove were correct, misapplication of a long-settled standard of review plainly does not meet this Court's criteria for certiorari.

Moreover, the district court proceedings and the verdict were riddled with serious defects that the City raised below, but that the Court of Appeals had no occasion to reach. Those defects stand in the way of affirmance for Colony Cove.

Colony Cove took on enormous debt to purchase the park, betting that it could force the residents to bear its burden for it. Rebuffed, it claims the Constitution forces the City to cover that bet. The Court of Appeals applied blackletter law in rejecting Colony Cove's claim, and this Court should therefore deny the Petition.

STATEMENT OF THE CASE

1. In 1979, the City adopted an ordinance to regulate rents at mobilehome parks in the City ("Ordinance"), of which there are currently 21. ER 5:741:18-20, 5:755:4-6. "The term 'mobile home' is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself." *Galland v. City of Clovis*, 16 P.3d 130, 135 (Cal. 2001). "Because the owner of the mobile home cannot readily move it to get a lower rent, the owner of the land has the owner of the mobile home over a barrel." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1114 (9th Cir. 2010) (en banc).

2. The City's Ordinance invests the Mobilehome Park Rental Review Board with broad discretion to determine whether a park owner's requested rent increase is "fair, just, and reasonable." ER 4:597 (§ 4704(g)). The Ordinance does not prescribe any method for the Board's decisions. Rather, it lists factors for the Board to consider, including rent at comparable parks and capital improvements, but the factors are not exclusive, and no factor is dispositive. ER 4:597-98 (§ 4704(g)), 5:742:2-5; Pet. App. at 4a-5a.

3. Colony Cove's principal, James Goldstein, bought his first mobilehome park in the City in 1983. ER 4:566, 4:616, 5:738:14-739:9. Shortly thereafter, Goldstein applied for a rent increase to pass his debt service through to renters. The Board refused, granting a much smaller rent increase that excluded near-

ly all of the acquisition debt service. ER 4:616, 5:756:17-758:11.

Colony Cove purchased the instant rent-controlled mobilehome park in April 2006 in a highly leveraged transaction, taking out an $18 million loan to finance the approximately $23 million purchase price. ER 5:741:1-11. The loan required annual debt service payments of $1.2 million, greatly exceeding the prior owner's total annual profits. ER 5:722:7-19, 4:461. Indeed, Colony Cove's appraisal showed that the purchase price was justifiable only if the Board would allow park residents' rents to be increased to pass through the mortgage interest expense. ER 4:453. Yet before Colony Cove purchased the park, Goldstein's long-time counsel warned him in writing that he should not expect any rent increase. ER 4:428.

4. Later in 2006, the City amended the non-binding guidelines for implementation of the Ordinance ("Guidelines"). The amendment clarified that, among other methods, the Board could use the Maintenance of Net Operating Income ("MNOI") method to make its decisions, as it was already routinely doing. The MNOI method excludes mortgage interest expenses, thereby preventing owners from manipulating financing arrangements to obtain larger rent increases. ER 4:601-02 (§ II(C)); 6:798:17-799:11, 4:556-557; *see also, e.g.,* ER 5:760:1-761:5; 4:569-70; 4:628-30; 4:634-35, 4:622-27.

5. Colony Cove applied for rent increases in 2007 and 2008 totaling roughly $550 per space per month, which would have more than doubled existing rents and dwarfed any rent increase awarded in the histo-

ry of the Ordinance. Nearly all of the requested rent increase was based on Colony Cove's $1.2 million in annual interest expense. ER 4:527, 5:750:9-25; 4:484; 4:459-61; 5:754:7-18.

Applying the MNOI method, the Board awarded rent increases totaling $61.76 per space per month, thereby increasing Colony Cove's annual gross income by approximately $300,000. ER 4:539-40, 4:551. Two years later, Colony Cove refinanced its mortgage to reduce its debt service, and the park has earned significant profits ever since.[1] *See* ER 3:278.

6. Colony Cove challenged the Board's 2007 rent increase decision in federal court in October 2008. The district court dismissed Colony Cove's claims as untimely, unripe, and unmeritorious, and the Court of Appeals affirmed. *See Colony Cove Props., LLC v. City of Carson* (*Colony Cove I*), 640 F.3d 948 (9th Cir. 2011), *cert. denied,* 565 U.S. 971 (2011).

Specifically, the court rejected Colony Cove's argument—which it nonetheless continues to reiterate (*e.g.,* Pet. at 2, 6)—that the 2006 Guideline amendment had "changed the rules" applicable to rent control decisions. 640 F.3d at 957 (holding that the "2006 Amendment did not alter the 1979 Ordinance itself," which exclusively governs the Board's rent increase decisions). The court held that the Board's decision was not arbitrary because neither the "Ordinance [n]or the Guidelines require the Board to

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[1] The district court improperly excluded all evidence of the park's value, revenue, or financial changes after July 2009, including Colony Cove's mortgage refinancing and subsequent profits. ER 3:271-79; ER 1:34.

employ any particular methodology in conducting its review of rental increase applications." *Id.* at 960-62.

7. Colony Cove next tried to overturn the Board's rent increase decisions in state court. *See Colony Cove Props., LLC v. City of Carson*, 163 Cal. Rptr. 3d. 499 (Cal. Ct. App. 2013). The California trial and appellate courts both rejected Colony Cove's challenges on the merits. *Id.* at 502. The state court of appeal explained that the MNOI method has not only been approved by multiple courts but "praised . . . for its fairness and ease of administration." *Id*. at 521 (quotation omitted).

8. Colony Cove then returned to federal court to file this suit in April 2014. Colony Cove pled a Fifth Amendment regulatory takings claim under several theories and a substantive due process claim. ER 3:386-420. The district court partially granted the City's two motions to dismiss, narrowing Colony Cove's claims to a single as-applied *Penn Central* claim challenging the rent increase decisions. ER 1:44-74. Over the City's objections, the district court concluded that the entire case should be decided by a jury. ER 1:40:25-43:13; 3:253-54.

At trial, Colony Cove failed to present any evidence from which the jury could determine the extent to which the Board's decisions affected the market value of Colony Cove's property. It presented no evidence of the value of the park before or after the challenged decisions, and no evidence comparing its future cash flows with and without the challenged actions. Rather, Colony Cove chose to show economic impact with evidence only of the additional rental income it would have received had the Board

allowed it to impose its mortgage interest expenses on renters. Pet. App. at 12a.

The jury returned a verdict for Colony Cove, concluding that it was entitled to $3,336,056 in just compensation. ER 2:104-06. The court denied the City's renewed motion for judgment as a matter of law. ER 1:17. The court then awarded Colony Cove prejudgment interest and attorneys' fees. ER 2:96-98; 2:80-83; 1:3, 1:8, 1:16-17.

9. The City appealed, and the Court of Appeals reversed in a unanimous opinion, concluding that the City was entitled to judgment as a matter of law. The court determined that no reasonable trier of fact could find for Colony Cove on any of the three *Penn Central* factors. Pet. App. at 13a-14a, 18a, 20a. In particular, the court held that Colony Cove "presented no evidence, by virtue of analyzing diminished income streams or otherwise, of the post-deprivation value of the Property." *Id.* at 13a.

Although the City argued that the district court erred in sending the entire *Penn Central* claim to the jury, the Ninth Circuit declined to reach that issue and instead applied the standard of review applicable to a jury verdict. Pet. App. at 9a, 20a n.10.

Colony Cove petitioned the Court of Appeals to rehear the case en banc. No judge requested rehearing, and the court denied the petition. Pet. App. at 21a. Colony Cove then filed its Petition in this Court.

REASONS FOR DENYING THE PETITION

I. Colony Cove's first question presented involves neither an unsettled issue of law nor a conflict with any other circuit.

In holding that no reasonable trier of fact could have found a regulatory taking of Colony Cove's property under the multi-factor *Penn Central* test, the Court of Appeals applied the standard for evaluating the economic impact of regulation developed by this Court and consistently applied by the courts of appeals. Pet. App. at 10a-14a. Colony Cove's first question presented therefore does not satisfy this Court's criteria for certiorari.

A. The Court of Appeals' holding that Colony Cove failed to carry its burden of showing economic impact is based on settled regulatory takings principles.

This Court has held that "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). The Court of Appeals did nothing more than apply that basic principle.[2]

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[2] In the Court of Appeals, Colony Cove admitted that "economic impact is judged by comparing the property's value before the government action to the value just after the government action." Brief for Plaintiff-Appellee Colony Cove Properties, LLC at 35 n.5, *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018), ECF No. 47.

1. Colony Cove never put on *any* evidence of "the value that has been taken from the property" *or* "the value that remains in the property."[3] *See* Pet. App. at 12a. Instead, it put on evidence of "lost rental income," Pet. App. at 12a, *viz.* the amount of revenue it would have received if the City had granted the full rent increase it requested. Pet. at 7-8; Pet. App. at 8a, 12a. The obvious flaw in this approach is that it provides no evidence with which the court—or here, the jury—can make the before-and-after "compar[ison]" required by this Court's takings cases. *Murr,* 137 S. Ct. at 1943. Lacking that comparative information, one cannot know whether the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster," which, as Colony Cove admits (Pet. at 15), is the touchstone of the takings inquiry. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Court of Appeals correctly applied this principle to hold that Colony Cove had altogether failed to demonstrate the severity of the impact of the challenged rent increase decisions. Pet. App. at 12a-13a.

In any event, even if the value of the property without the rent increase decisions were interpreted as the purchase price Colony Cove paid for the property ($23 million), the Court of Appeals noted that the lost rental income would amount—at most—to a

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[3] In fact, Colony Cove moved in limine to *exclude* all evidence of the value of the property or income from the property after 2009. *See supra* note 1. It strategically prevented the jury from contextualizing the "lost" income with information about the value and profitability of the park—the very context that this Court's takings cases demand.

28.4 percent diminution in that value. Pet. App. at 12a & n.4. As the court recognized, such economic impact is far below the level necessary to show a regulatory burden "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 11a-12a (quoting *Lingle*, 544 U.S. at 539).

Colony Cove does not dispute that "one of the critical questions" in the takings analysis is determining "the denominator of the fraction" used to calculate economic impact. *Murr*, 137 S. Ct. at 1944 (quoting *Keystone Butuminous Coal Ass'n*, 480 U.S. at 497). Yet nowhere in its Petition, or in its briefing in the Court of Appeals, has Colony Cove offered any answer. Instead, it merely disputes the use of the entire property value as the denominator and makes no attempt to define an alternative.

2. By introducing evidence solely of lost income, Colony Cove effectively attempted to define the relevant property interest not as the fee simple interest it owns in the park, but rather as the hypothetical rental income to which it claims entitlement. But defining the relevant property interest solely as the aspect affected by the regulation is "circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002). "If owners could define the relevant 'private property' at issue as the specific 'strand' [in the bundle of rights] that the challenged regulation affects, they could convert nearly all regulations into *per se* takings." *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting). The Court of Appeals correctly held that Colony

Cove failed to show the severity of the impact of the City's actions on its full property interest, as this Court's takings cases plainly require.

3. Colony Cove contends that the Court of Appeals' decision is inconsistent with this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1983). Pet. at 3-4. Not at all.[4]

First, Colony Cove fails to explain why this case is a temporary takings case. In fact it is not. The rent increase granted by the City is permanent, and conversely, the denial of the additional increase sought by Colony Cove is similarly permanent.

Further, Colony Cove's suggestion that the decision below renders temporary takings impossible in violation of *First English* misunderstands this Court's decision in that case. *First English* merely held that a regulatory action found to be a taking remains so even though the action is terminated and thus made temporary. 482 U.S. at 319. The sine qua non of such a claim is a *permanent* taking, cut short by rescission of the regulation. *First English* does not support Colony Cove's claim that a temporary loss of income resulting from regulation (even if this case involved such a loss) necessarily must be a taking.

Colony Cove's analogy of the taking of a leasehold through physical occupation of property is similarly inapt. *See* Pet. at 18, 19-20. This Court has repeated-

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[4] In fact, Colony Cove never cited *First English* in the Court of Appeals, despite the fact that the City had made the same argument later adopted by the Court of Appeals.

ly distinguished physical occupation as a peculiarly severe interference with property rights, given the privileged position of the right to exclude. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432-33 (1982); *see also Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2427 (2015). As a result, physical occupation, "however minor," can effect a taking. *Lingle*, 544 U.S. at 538. In distinct contrast, the rent increase decisions here—which regulate the income that may be generated by commercial property—are nothing like a physical occupation. *See* Pet. App. at 19a; *see also Yee v. City of Escondido*, 503 U.S. 519, 527-28, 532 (1992).

In sum, the Court of Appeals' application of *Penn Central*'s economic impact factor implicates no important and unsettled question of constitutional law. Rather, it merely applied the most basic principle of this Court's takings law: that a takings claim requires a comparison of the value of the affected property before and after the challenged regulatory decision.

B. The Court of Appeals' opinion is consonant with *CCA Associates*, which Colony Cove blatantly mischaracterizes.

Colony Cove also attempts to manufacture a split of authority by claiming that the Court of Appeals' economic impact analysis is at odds with *CCA Associates v. United States*, 667 F.3d 1239 (Fed. Cir. 2011). Colony Cove distorts *CCA Associates* beyond recognition. Pet. at 22-24. The Ninth Circuit in fact

applied the very same economic impact test here that the Federal Circuit applied in *CCA Associates*.

1. Colony Cove's perceived circuit split is based solely on dictum in *CCA Associates* that is not explained or supported in the opinion, has never been followed, and has no precedential value. *See United States v. Gaudin*, 515 U.S. 506, 522 (1995) (holding "*obiter dicta* . . . may properly be disregarded"). By contrast, the Ninth Circuit's decision was fully consistent with the *holding* in *CCA Associates*.

The *CCA Associates* panel suggested it would have preferred to apply a purported "traditional lost rent . . . approach" to calculating economic impact. 667 F.3d at 1247. But the court cited no case exemplary of that "tradition" and, tellingly, neither does Colony Cove. And no court since has followed that mythical tradition.

2. Nor did *CCA Associates* itself follow that approach. Instead, in its *holding*, the court applied a measure of economic impact dictated by the Federal Circuit's prior decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007). The *CCA Associates* court concluded that it was "bound by the economic impact methodology" applied in *Cienega Gardens*. 667 F.3d at 1246. Lest there be any doubt, it repeated *seven times* that it was "bound" by *Cienega Gardens*. *Id.* at 1242, 1244, 1246, 1247, 1248.

Cienega Gardens required that the severity of a regulation's economic impact be shown by "compar[ing] the value of the restriction to the value of the property as a whole." 503 F.3d at 1282. It recognized that "[t]he Supreme Court, in cases like [*Penn*

Central] . . . has made clear that in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation." *Id.* at 1280.

Citing *Cienega Gardens*, the Ninth Circuit applied the same economic impact framework here. Pet. App. at 13a. Given that the Court of Appeals expressly applied the very same test applied in *CCA Associates* and reached the same conclusion, Colony Cove has shown no conflict of authority.

II. Colony Cove's second question is either not worthy of certiorari or not presented at all.

At the outset, Colony Cove frames its second question presented as asking the Court to confirm the standard of appellate review of jury verdicts. Pet. at i. Yet Colony Cove transforms the question in its argument. Pet. at 25-29. It there frames the question as whether the Seventh Amendment guarantees a right to a jury trial in takings cases. Under either form, the question does not meet the criteria for certiorari.

1. As first posed, this question presented falls *far* short of those criteria. The standard of review of a jury verdict is undisputed and was properly stated by the Court of Appeals. Pet. App. at 10a ("whether Colony presented sufficient evidence on [the *Penn Central*] factors to allow a reasonable finder of fact to conclude" that the City effected a taking). It is neither the subject of a conflict among the circuits or with state courts of last resort nor a significant and unresolved legal question. It also satisfies none of

the other extraordinary criteria for review. *See* Sup. Ct. Rule 10.

At most, the question challenges the Court of Appeals' application of the unquestioned standard of review. Colony Cove contends that the court failed to dutifully apply the standard and give the requisite deference to the jury's conclusion. Pet. at 27-28.

But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. "Error correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman et al., *Supreme Court Practice* § 5.12(c)(3), p. 351 (9th ed. 2007))); *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring).

Alleged misapplication of a long-settled standard of review is hardly a "compelling reason[]" for review. Sup. Ct. Rule 10. The question as stated at the outset of the Petition is therefore plainly not worthy of review.

2. Colony Cove implicitly recognizes that this milquetoast question is a nonstarter—it offers no supporting argument. Instead, it directs its argument to a question that is unresolved but *not presented*: whether the Seventh Amendment guarantees a right to have a jury apply the multi-factor *Penn Central* takings test. Pet. at 27, 29. Because the Court of Appeals reversed on the merits, it expressly declined to reach the City's contention that the *Penn*

Central test should not have gone to the jury. Pet. App. at 20a n.10.

This Court consistently refuses to resolve weighty constitutional questions that were never addressed by the court of appeals. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 201-02 (2012); *Pierce v. Guillen*, 537 U.S. 129, 148 n.10 (2003) (citing *NCAA v. Smith*, 525 U.S. 459, 470 (1999)). That is because this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court should adhere to this longstanding practice and reject Colony Cove's second question.

III. Far being from being an "ideal vehicle," this case is a lemon: the verdict is fatally defective on a host of additional grounds.

Colony Cove contends that this case is an "ideal vehicle" for the Court to consider the questions presented. Pet. at 24. It is nothing of the sort. Even if the Court were to rule for Colony Cove, numerous serious defects in the verdict and the district court proceedings stand between Colony Cove and affirmance of the verdict.

1. Even if this Court were to grant Colony Cove's wish to redefine the proper measure of economic impact under *Penn Central*, the Court of Appeals' decision would remain valid because the court held that no reasonable trier of fact could conclude that the two remaining *Penn Central* factors supported the finding of a taking. Pet. App. at 18a, 20a.

The Court of Appeals concluded that no reasonable trier of fact could conclude that Colony Cove had a "distinct investment-backed expectation" that the

City would grant its requested rent increase, given the lack of any requirement in the Ordinance, Goldstein's own experience with rent control in the City, and the unprecedented scale of the requested increases. Pet. App. at 14a-18a. Colony Cove's only objection to this conclusion is that the court misapplied the standard of review, Pet. at 27-28, which even if correct, would fall far short of the criteria for certiorari.

The court also held that the "character of the governmental action" failed to support the verdict. Pet. App. at 19a-20a. It followed this Court's direction in *Penn Central* in holding that the rent decisions involved "adjusting the benefits and burdens of economic life to promote the common good" and were hardly akin to "a physical invasion." *Id.* at 19a (quoting *Penn Central,* 438 U.S. at 124). Colony Cove points to nothing in this conclusion that could justify granting the Petition.

2. The City argued below that the district court improperly asked the jury to apply the *Penn Central* takings test, a legal standard that even this Court has found to be "vexing." *Lingle*, 544 U.S. at 539. The Court of Appeals expressly declined to reach that question in light of its holding. Pet. App. at 20a n.10.

Although this Court has recognized a general right to a jury trial in § 1983 takings cases, it has also clearly held that some issues in such cases will be inappropriate for a jury's resolution. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999); *see also id.* at 731 (Scalia, J., concurring). *Del Monte Dunes* did not involve a *Penn*

Central claim, and thus the Court had no cause to consider whether application of that test is a jury issue.

In fact, the *Penn Central* test represents "a classic exercise of judicial balancing of competing values." *Fla. Rock Indus. v. United States,* 18 F.3d 1560, 1570 (Fed. Cir. 1994). Its application is therefore "a question of law that is based on factual determinations." *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004).

Because the Court of Appeals did not address this issue, it is not presented here and would require remand for resolution. *See supra* Section II.

3. Even if the district court was right to ask the jury to apply *Penn Central*, its instructions failed to properly prepare the jury for that daunting task. The court merely repeated verbatim the three factors set out in *Penn Central*. ER 2:102. "Standing alone, those [*Penn Central*] factors are so general that they provide little guidance." *Branch ex rel. Me. Nat'l. Bank v. United States*, 69 F.3d 1571, 1578-79 (Fed. Cir. 1995). Yet the district court provided no context to explain how those factors have been applied. Moreover, the court rejected the City's request to instruct the jury that it must find the City's action to be "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner." *Lingle*, 544 U.S. at 539; *see* ER 2:215, 1:30:1-31:1.

The Court of Appeals did not address the propriety of the jury instructions. But that issue must also be resolved for the verdict to stand.

4. The verdict was also tainted by the district court's material errors in the admission of evidence. For example, the district court refused to preclude Colony Cove from arguing that the City had "changed the rules" applicable to the rent increase applications after Goldstein purchased the park. ER 1:36, 3:284-93. The Court of Appeals previously held in *Colony Cove I* that the City had done no such thing; the Board always had authority to apply the MNOI method to rent increase applications. *See* 640 F.3d at 957. The erroneous notion that the City had unfairly "changed the rules" formed the heart of Colony Cove's arguments to the jury.[5] *See, e.g.,* ER 5:646:4-647:23; 5:656:1-15; 6:840:16-841:12; 6:848:22-851:12; 6:856:9-23; 6:870:19-25; 6:898:21-900:15; 6:903:14-909:20. Yet that position was precluded as a matter of both issue preclusion and precedent. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *In re Staff Mortg. & Inv. Corp.*, 625 F.2d 281, 282-83 (9th Cir. 1980).

Further, the district court allowed Colony Cove to introduce appellate opinions as evidence and to argue their legal significance to the jury. Colony Cove introduced *Carson Gardens, LLC v. City of Carson Mobilehome Park Rental Review Board*, 37 Cal. Rptr. 3d 768 (Cal. Ct. App. 2006), to suggest—incorrectly and improperly—that the City had violated the law by refusing to allow debt service to be passed on to park residents in this case. *See* Pet. App. at 15a. But the sole issue in *Carson Gardens* was whether the City had complied with a prior, unappealed superior

[5] And they continue to flog that horse here. *See* Pet. at 2.

court order in an unrelated case—an order that the court of appeal strongly implied had been incorrect. *See* 37 Cal. Rtpr. 3d at 775-76. The introduction of and argument about these opinions was unfairly prejudicial to the City.

These evidentiary errors are undoubtedly beneath this Court's notice and were not addressed by the Court of Appeals. But they too must be resolved to sustain the verdict.

CONCLUSION

For these reasons, the City respectfully requests that the Court deny the Petition.

Respectfully submitted,

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