No. 18-573

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

REPLY BRIEF FOR PETITIONER

RICHARD H. CLOSE
THOMAS W. CASPARIAN
COZEN O' CONNOR P.C.
1299 Ocean Avenue
Suite 900
Santa Monica, CA 90401
(310) 393-4000

ANTON METLITSKY
(Counsel of Record)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

MATTHEW W. CLOSE
DIMITRI D. PORTNOI
DANIEL J. TULLY
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000

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REPLY BRIEF FOR PETITIONER

As the petition explained, Pet. 12-24, and as the amicus submissions confirm, Center for Constitutional Jurisprudence Amicus Br. 3-11; NFIB Amicus Br. 4-14; Pacific Legal Found. Amicus Br. 7-14, the decision below raises a question of fundamental importance to regulatory takings jurisprudence. Indeed, if the Ninth Circuit were right—i.e., if the all-important economic-impact factor under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), could only be proven by showing a substantial reduction in the total fee simple value of the property after the alleged regulatory taking compared to the total value of the property before the taking—then there would be no such thing as a temporary regulatory taking, since no temporary taking would ever satisfy the Ninth Circuit's test. *See* Pet. 19–21; Center for Constitutional Jurisprudence Amicus Br. 10–11; NFIB Amicus Br. 9–10; Pacific Legal Found. Amicus Br. 10–12.

Respondents have no real answer to this fundamental problem with the decision below, and the responses they do attempt only highlight the need for this Court's review of the first question presented. Review, moreover, would be warranted even if the decision below were not so obviously wrong, because that decision creates a conflict with the Federal Circuit that respondents try but fail to explain away.

Under these circumstances, it is critical to resolve the question of how the *Penn Central* economic-impact applies in the context of temporary takings. But the Court should not stop there, because the Ninth Circuit's complete failure to accord deference to the

jury's verdict raises a second important question requiring this Court's review. Respondents are wrong that this question simply challenges the application of an established legal standard to the facts here. To the contrary, the Ninth Circuit's failure to accord the jury deference demonstrates a takings-specific hostility to this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that under the Seventh Amendment, regulatory takings questions are for juries rather than courts to resolve. The Ninth Circuit's refusal to adhere to this Court's precedent warrants this Court's review.

The petition should be granted.

A. The Court Should Resolve The First Question Presented Concerning The Scope Of The *Penn Central* Economic-Impact Analysis

Colony Cove demonstrated at trial (and the jury below agreed) that the economic impact of respondents' retroactive rules change satisfied the first prong of the *Penn Central* test by presenting evidence that it was forced to operate at cash losses of approximately $1 million per year for several years after respondents' regulatory conduct—and would have gone into foreclosure absent a new infusion of capital from its owner—whereas the property would have been allowed to maintain its previous (modestly positive) net income absent the challenged regulatory conduct. Pet. 7–9. The Ninth Circuit held, however, that this evidence failed to satisfy the *Penn Central* economic-impact factor as a matter of law, because Colony Cove did not show a significant diminution in the total fee simple value of the property. The petition explained

that this holding (i) is irreconcilable with this Court's flexible approach to regulatory takings, (ii) would have the effect of eradicating all temporary regulatory takings, and (iii) brought the Ninth Circuit into conflict with the Federal Circuit over the question presented. Pet. 12–24. Respondents' attempted answers to these arguments only confirm that this Court's review is warranted.

1. Respondents' main argument in support of the decision below is that 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." Opp. 9 (citation omitted). But that argument assumes the answer to the question presented. The point is that it is not necessary in the context of a temporary regulatory taking to show a substantial diminution in the fee simple value; it is enough to demonstrate severe (even if temporary) cash losses resulting from the challenged regulatory conduct that threaten the continued viability of the property.[1] Pet. 18–19.

a. Respondents' contrary argument misconstrues this Court's precedent. The Court has required a comparison of "the value that has been taken from the property with the value that remains in the property." Opp. 8 (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933,

[1] In light of Colony Cove's evidence of rental losses, respondents' contention that Colony Cove has not identified the "denominator of the fraction" to calculate economic impact is puzzling. Opp. 10. The denominator of the fraction is the expected rental income that Colony Cove would have earned over the relevant period absent respondents' retroactive regulations. The numerator is the substantial cash losses that Colony Cove, in fact, suffered because of those regulations.

1943 (2017)). But it has never limited this comparison to the value of the whole property before and after the challenged regulation. Indeed, a survey of the Court's seminal regulatory takings cases confirms that the Ninth Circuit's rigid formula for economic impact cannot be reconciled with this Court's precedent:

- In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the first regulatory takings case, this Court held that a taking had occurred not based on the diminution of total property value, but because the challenged regulation rendered removal of coal "commercially impracticable." *Id.* at 414.
- In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), this Court held that regulations resulting in a confiscatory rate of return affected a taking without considering diminution in the lifetime value of the utility.
- In *Penn Central* itself, this Court rejected a regulatory takings claim not because the regulation did not substantially affect the property's lifetime value, but because the plaintiff continued "to obtain a 'reasonable return' on its investment." 438 U.S. at 136.

Colony Cove demonstrated below that respondents' retroactive regulatory conduct rendered continued operation of the property "commercially impracticable." *Mahon*, 260 U.S. at 414. It may be true that a foreclosing lender might have been able to extract value from the property after Colony Cove was forced to give up the business (which it would have been

forced to do absent a new capital infusion from its owner). But that obviously does not shield municipal regulatory conduct from scrutiny under the Takings Clause, as this Court's precedents make clear.

b. Indeed, respondents' rule limiting economic impact analysis to a showing of substantial diminution in the total fee simple value of the property would preclude essentially all temporary regulatory takings claims, because a temporary taking is highly unlikely to result in a substantial reduction in the total value of the property over its lifetime, even if it has a severe but temporary impact on the property's income-generating capacity. Pet. 18–19.[2]

That is why this Court has traditionally held in the context of physical temporary takings that just compensation is not calculated by showing the decrease in value of the property, but rather by demonstrating lost return, rent, or profit. *See, e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949)

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[2] Respondents appear to suggest there is really no such thing as a temporary takings claim, unless the government initially intended a permanent taking but later changed its mind. Opp. 11. There is no principle that would protect from constitutional scrutiny a government's decision to temporarily deprive by regulation a property owner's use of her property. Respondents cite *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987), but that case did not involve a permanent regulation turned temporary; rather, it involved a temporary, *interim*, flood-control measure. *Id.* at 319. The cases on which *First English* relied likewise involved temporary war measures that were not initially conceived as permanent. *Id.* at 317–21; *see, e.g.*, *United States v. Dow*, 357 U.S. 17 (1958) (taking under Second War Powers Act).

("[T]he proper measure of compensation [in a temporary takings case] is the rental that probably could have been obtained."). As Justice Reed, supplying the necessary fifth vote in *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), explained: "Market value, despite its difficulties, provides a fairly acceptable test for just compensation when the property is taken absolutely. But in the temporary taking of operating properties, market value is too uncertain a measure to have any practical significance." *Id.* at 120 (citations omitted).

Respondents' assertion that physical occupations are different from regulatory takings, Opp. 11–12, is true but irrelevant. As respondent elsewhere admits, the question in regulatory takings cases is whether the government action is "functionally equivalent to the classic taking." Opp. 18 (quotations omitted). A government obviously cannot (without paying just compensation) temporarily occupy a rental property, or temporarily seize all rents for itself, even if such government conduct would not substantially deplete the property's total value. Yet Colony Cove showed (and a jury agreed) that respondents achieved exactly the same result through regulation in this case. The court of appeals' determination that this proof is insufficient as a matter of law to prove a taking is not only wrong, but would preclude every temporary regulatory takings claim in the Ninth Circuit. Such a

stark result should not be accepted absent this Court's review.[3]

2. Finally, this Court's review is required to resolve a circuit conflict between the decision below and the Federal Circuit's decision in *CCA Associates v. United States*, 667 F.3d 1239 (Fed. Cir. 2011). *See* Pet. 22–24. *CCA Associates* holds that outside the limited context of two federal housing statutes analyzed in prior Federal Circuit cases, courts should consider the economic impact of "temporary regulatory restrictions on fee simples" by applying the "traditional" approach, 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 1246-47.

Respondents offer two attempts to explain away this circuit conflict, but neither is persuasive.

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[3] Respondents pretend that this is not a temporary takings case. Opp. 11–12. Nonsense—the claim is that respondents affected a taking by retroactively implementing "maintenance of net operating income" analysis and its "consequent failure to take debt service into account in setting [Colony Cove's] *the 2007 and 2008 rents*," which "cause[d] Colony to lose rental income of approximately $5.7 million." Pet. App. 5a, 8a (emphasis added). Respondents understood the temporary nature of the claim below, which is why they argued that the court's jury instructions should provide guidance for how "to account for the … period of the 'temporary taking.'" ER-249-50; *see also* ER-166, ER-188-89, ER-217-18. So did the district court, which instructed the jury to consider "the loss and the nature of income-producing potential *for the months that the regulatory taking was in effect*." ER-865-66 (emphasis added).

First, respondents correctly point out (as the petition itself acknowledged, Pet. 23) that the Federal Circuit was bound by prior precedent to apply the diminution-in-total-property-value approach to claims under the specific federal housing statutes at issue there. Opp. 13–14. But the court expressly noted that this approach was "limited to [Emergency Low Income Housing Preservation Act] and [Low–Income Housing Preservation and Resident Homeownership Act] cases," explaining that if "this methodology were to apply beyond ELIHPA and LIHPRHA cases, for example to temporary regulatory restrictions on fee simples, then all income earned over the entire remaining useful life of the real property would be the denominator," and "[t]his would virtually eliminate all [temporary] regulatory takings." 667 F.3d at 1247. Respondents offer no credible reading of *CCA Associates* that would reconcile Federal Circuit law with the decision below.

Second, respondents fault *CCA Associates* for failing to cite cases applying the "traditional lost rent … approach" to takings analysis. Opp. 13 (quoting 667 F.3d at 1247). But as explained above, evaluating temporary takings based on lost rent (rather than diminution in total property value) *is* this Court's traditional approach. *See supra* at 3–6. It is also (not surprisingly) the Federal Circuit's traditional approach. *See, e.g.*, *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("The usual measure of just compensation for a temporary taking, therefore, is the fair rental value of the property for the period of the taking."). The decision below, in con-

trast, "would virtually eliminate all [temporary] regulatory takings." *CCA Associates*, 667 F.3d at 1247. This Court should grant certiorari to resolve this decisional conflict on an important question of takings law.

B. The Court Should Resolve The Second Question Presented Concerning The Standard Of Appellate Review In Regulatory Takings Cases

This Court concluded in *Del Monte Dunes* that the Seventh Amendment jury-trial right applies to regulatory-takings claims brought under 42 U.S.C. § 1983. Pet. 27. The district court accordingly submitted the matter to a jury, which concluded after a four-day trial that respondents had affected a regulatory taking under *Penn Central*. Because the Seventh Amendment disallows appellate reexamination of facts, Pet. 26, the court of appeals was required to grant all possible factual inferences to petitioners (i.e., the judgment winners). Instead, the court of appeals reweighed and revaluated the evidence, as if the question whether respondents had affected a taking were left to appellate judicial determination in the first instance. Pet. 27–28. The court of appeals' approach to appellate review in takings cases is incompatible with the Seventh Amendment's Reexamination Clause and this Court's opinion in *Del Monte Dunes*, and affords this Court a second, independent basis for review.

Respondents do not defend the Ninth Circuit's analysis on the merits, instead arguing that certiorari is unwarranted because the petition merely presents the application of a settled standard of review to the

particular facts of this case. Opp. 14–15. Not so—no appellate court could possibly think that crediting a defendant's evidence while ignoring the prevailing plaintiff's could possibly be consistent with the Seventh Amendment's requirements. *See Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379–80 (1913). To take just the most stark example, the court of appeals held as a matter of law that Colony Cove's owner could not have had a reasonable expectation that respondents would treat mortgage interest as an allowable expense, even though (i) he testified that he in fact had that understanding based on his many years of past dealings with respondents, and (ii) *respondents' own witness* acknowledged that a property buyer in Colony Cove's owner's position would reasonably have expected that mortgage interest would have been treated as an allowable expense. Pet. 27–28. Such aggressive appellate reexamination of a jury verdict cannot simply be written off as a misapplication of a settled legal standard.

Rather, what explains the panel's departure from the Reexamination-Clause-mandated, deferential standard of review of jury verdicts is hostility to a jury deciding a regulatory takings case. Respondents note that the question whether the Seventh Amendment applies to regulatory takings cases in the context of § 1983 actions is not presented here. Opp. 15–16. That is true, but not because the answer is in doubt—this Court has *already resolved that question*, holding in *Del Monte Dunes* that regulatory takings cases brought under § 1983 (like this one) are subject to the Seventh Amendment, and thus must be presented to a jury. Yet the Ninth Circuit expressly questioned the

propriety of jury resolution of regulatory takings cases at oral argument.[4] And that skeptical view of jury determination of regulatory takings questions resulted in a form of appellate review simply irreconcilable with the Reexamination Clause.

There is no cause for such skepticism: "The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring)), which is exactly the kind of analysis juries are well-suited to perform. That was the basis of this Court's holding in *Del Monte Dunes*: because regulatory-takings questions present "essentially ad hoc, factual inquiries, requiring complex factual assessments of the purposes and economic effects of government actions," 526 U.S. at 720 (quotations and citations omitted), their resolution "is for the jury," *id.* at 721. The court of appeals' apparent belief that it could better engage in the "ad hoc, factual inquiries" required by regulatory takings analysis is flatly inconsistent with this Court's precedent (and with the Reexamination Clause).

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[4] Oral Argument at 27:02–27:33, *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018) (No. 16-56255), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000031946 (Judge Hurwitz: "Why was it in front of a jury? I mean -- isn't the ultimate issue of whether a taking has occurred a legal issue? … How can a jury balance the three *Penn Central* factors and decide whether there's a taking?").

The petition should be granted, and the decision below reversed.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

[5] As the petition explained, this is an ideal vehicle to resolve both questions presented. Pet. 24, 29. Respondents do not seriously dispute that the legal questions described above are cleanly presented, but instead argue that *other* legal questions that the court of appeals did not consider might have to be answered on remand if the Court grants certiorari and reverses. Opp. 16–20. Some of the questions respondents say will have to be resolved on remand are utterly insubstantial—for example, they will argue on remand that a jury trial was improper here despite *Del Monte Dunes*. *See supra* at 9. But no matter—those questions can safely be left to the court of appeals on remand. The possibility of further proceedings on remand is routine and obviously poses no barrier to this Court's review.

Respectfully submitted,

RICHARD H. CLOSE
THOMAS W. CASPARIAN
COZEN O' CONNOR P.C.
1299 Ocean Avenue
Suite 900
Santa Monica, CA 90401
(310) 393-4000

ANTON METLITSKY
(Counsel of Record)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

MATTHEW W. CLOSE
DIMITRI D. PORTNOI
DANIEL J. TULLY
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000

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