No. 11-1352

In the Supreme Court of the United States

CCA ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the *ad hoc* balancing test prescribed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), in considering petitioner's contention that a regulatory taking of its property had occurred.

2. Whether the court of appeals correctly dismissed petitioner's breach-of-contract claim on the ground that, in light of the relationship between the three interlocking documents at issue in this case, there was no privity of contract between petitioner and the government with respect to the contractual term that governed prepayment of petitioner's mortgage.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 667 F.3d 1239. The opinions of the Court of Federal Claims are reported at 91 Fed. Cl. 580 (Pet. App. 47a-143a) and 75 Fed. Cl. 170 (Pet. App. 144a-234a).

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2011. A petition for rehearing was denied on February 9, 2012 (Pet. App. 235a-236a). The petition for a writ of certiorari was filed on May 8, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1961, Section 221(d)(3) of the National Housing Act first authorized the Federal Housing Admin-

istration (and later, the Department of Housing and Urban Development (HUD)) to provide mortgage insurance and to fund below-market-interest-rate loans to stimulate private development of moderate- and low-income housing. 12 U.S.C. 1715*l*(d)(3). Under the Section 221(d)(3) Program, a private developer could enter into a "regulatory agreement" with HUD whereby the owner accepted specific restrictions on the mortgaged property, including restrictions on tenant income, allowable rental rates, and cash distributions that could be received from the project. Pet. App. 148a; see generally *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1325 (Fed. Cir. 2003) (*Cienega VIII*). The regulatory agreement remained in effect as long as the property was subject to the insured mortgage, and the mortgage note prohibited prepayment of the mortgage without the government's approval for the project's first 20 years. Pet. App. 149a-150a.

b. In the late 1980s, as the 20-year anniversary approached for many Section 221(d)(3) properties, Congress became concerned that many owners would prepay their mortgages, triggering a dramatic drop in the Nation's supply of low-income housing. Pet. App. 151a; see, *e.g.*, H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 192 (1987) (*1987 Conf. Rep.*). In 1988 and 1990, Congress enacted two statutes to preserve low-income housing.

In 1988, as a temporary measure, Congress enacted the Emergency Low Income Housing Preservation Act (ELIHPA), Pub. L. No. 100-242, 101 Stat. 1877 (1988). ELIHPA contained a two-year sunset provision and instituted a permitting process under which owners interested in prepaying their mortgages were required to apply to HUD for approval. *Id.* §§ 221-223, 101 Stat.

1878. That requirement enabled HUD, using the agency's knowledge and expertise, to assess whether a project's preservation as low-income housing was warranted. *1987 Conf. Rep.* 194. As an alternative to prepayment, ELIHPA made various financial benefits available to project owners, including a government-insured equity-take-out loan, increased annual cash distributions, housing assistance contracts, and financing for capital improvements. *Id.* §§ 224(b), 231, 101 Stat. 1880, 1884. In exchange for those financial benefits, owners agreed to extend the existing use restrictions on their properties. *Id.* § 225(b), 101 Stat. 1881. ELIHPA also authorized HUD to facilitate a project's sale to a qualified nonprofit organization. *Id.* § 224(b)(7), 101 Stat. 1880.

In 1990, Congress enacted the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), 12 U.S.C. 4101 *et seq.* Like its predecessor, LIHPRHA vested HUD with regulatory authority over prepayment, required owners to seek approval to prepay their HUD-insured mortgages, and provided opportunities to exit the program or seek monetary benefits in the event of a denial. 12 U.S.C. 4101(a), 4108-4110, 4114. LIHPRHA also allowed an owner to sell its property to a "qualified purchaser" at the "fair market value of the housing based on the highest and best use of the property," *i.e.*, the project's market value *without* HUD restrictions. 12 U.S.C. 4103(b)(2), 4110(b)(1). To facilitate such sales, which would entirely release owners from the program, HUD funded virtually all transaction costs and provided loans that enabled non-profit organizations to acquire projects. 12 U.S.C. 4110(d). An owner seeking to sell would be allowed to prepay and

exit the program if it could not complete a sale under the program. 12 U.S.C. 4114(a); Pet. App. 160a.

Like ELIHPA, LIHPRHA permitted HUD to offer owners financial incentives in exchange for extending their properties' use restrictions. 12 U.S.C. 4109. HUD could provide owners rent increases, an increased rate of return, access to project equity through a government-insured loan, and financing for capital improvements. *Ibid.*

c. ELIHPA and LIHPRHA (collectively, the Preservation Statutes) were criticized for the generous economic incentives they provided to owners and their resulting cost to the government. See *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1286-1287 (Fed. Cir. 2007), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008) (*Cienega X*). To address those concerns, Congress enacted the Housing Opportunity Program Extension Act of 1996 (HOPE Act), Pub. L. No. 104-120, 110 Stat. 834. Although the HOPE Act did not expressly repeal LIHPRHA, it "restored the prepayment rights to [o]wners" of moderate- and low-income housing. *Chancellor Manor* v. *United States*, 331 F.3d 891, 896 (Fed. Cir. 2003); see Pet. App. 161a.

2. Petitioner owns Chateau Cleary Apartments, a moderate-income, 104-unit apartment complex outside New Orleans that was developed under HUD's Section 221(d)(3) Program. Pet. App. 164a-171a. Petitioner's predecessors decided to build and operate the complex in 1969. *Id.* at 165a. Pursuant to a Regulatory Agreement, HUD insured a 40-year loan for $1,601,100 at a below-market interest rate, and two years later it insured a larger mortgage of $1,699,500. *Id.* at 165a-167a.

In May 1991, when petitioner had completed 20 years in the Section 221(d)(3) Program, the property was sub-

ject to ELIHPA and LIHPRHA. Petitioner was free to choose among the options available under the Preservation Statutes. Despite being advised that it was eligible for reduced regulation and significant incentives, and despite being aware that a non-profit organization was interested in purchasing Chateau Cleary in order to preserve it as affordable housing, petitioner chose not to take the actions necessary to seek incentives or permission to sell the property. Pet. App. 169a. Because petitioner did not pursue the preservation process, HUD never issued a final decision regarding the incentives available to petitioner, or whether prepayment would be permitted pursuant to ELIHPA or LIHPRHA.

In September 1998, after the enactment of the HOPE Act, petitioner prepaid the remainder of its mortgage and exited the Section 221(d)(3) Program. Pet. App. 170a-171a.

3. On May 13, 1997, petitioner filed suit in the Court of Federal Claims (CFC), asserting breach-of-contract and takings claims against the United States. Pet. App. 171a. In 1998, the CFC stayed proceedings pending the resolution of other cases involving similar challenges to the Section 221(d)(3) Program. *Ibid.* In *Cienega Gardens* v. *United States*, 194 F.3d 1231 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) (*Cienega IV*), the Federal Circuit found no privity of contract between HUD and property owners with respect to prepayment rights because the only prepayment provision was contained in a mortgage note to which the United States was not a party. *Id.* at 1239-1246. In 2001, the Federal Circuit held in *Cienega Gardens* v. *United States*, 265 F.3d 1237 (*Cienega VI*), that the Preservation Statutes did not amount to a physical invasion, and thus did not effect a per se taking. *Id.* at 1248-1249. In 2003, the Federal

Circuit issued further decisions and remand orders in *Cienega VIII* and *Chancellor Manor*. The CFC then lifted its stay in this case, and the suit proceeded to trial. Pet. App. 171a.

Meanwhile, the CFC also held trials in *Cienega Gardens* and *Chancellor Manor*. The court concluded in those cases that the government had temporarily taken the plaintiffs' contractual rights to prepay their mortgages. On November 22, 2005, the CFC entered judgment for those plaintiffs. *Cienega Gardens* v. *United States*, 67 Fed. Cl. 434 (2005), vacated, 503 F.3d 1266 (Fed. Cir. 2007), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008). The United States appealed both judgments.

In September 2006, before those appeals had been decided, the CFC in this case held a trial on petitioner's as-applied, regulatory taking claim. Pet. App. 171a. The court issued its opinion and entered judgment on January 31, 2007. *Id.* at 144a-234a. Based on its analysis under the framework set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), the CFC held that the government had temporarily taken petitioner's right to prepay its HUD-insured mortgage. Pet. App. 187a-217a. The court awarded $841,839 in compensation plus interest. *Id.* at 233a. In those proceedings, petitioner did not raise, and the CFC did not address, petitioner's breach-of-contract claim, nor any allegation that the Preservation Statutes had effected a physical taking.

4. The United States appealed. After the government had filed its initial brief, but before petitioner had filed its brief as appellee, a specially-assembled seven-judge panel of the Federal Circuit decided the appeals in *Cienega Gardens* and *Chancellor Manor*. See

Cienega X, *supra*. A six-judge majority of that panel vacated the judgments and remanded the cases "for a new *Penn Central* analysis under the correct legal standard." 503 F.3d at 1291. The court based its remand on four conclusions that are relevant here.

First, noting that the CFC had only "compared the rate of the return that the owner would receive on its investment with and without the restriction of a single year," the Federal Circuit held that the CFC had erred in failing to take into account the effect of the restriction on the property as a whole. *Cienega X*, 503 F.3d at 1280. The court observed that different methodologies might be used to measure that impact, and it directed the CFC on remand to consider all possible alternatives. *Id.* at 1282.

Second, the Federal Circuit held that the CFC had erroneously failed to consider the offsetting benefits that the statutory scheme afforded, which were specifically designed to ameliorate the effect of the prepayment restrictions. *Cienega X*, 503 F.3d at 1283-1284. The court recognized in particular that "[t]he sale and use agreement options * * * conferred considerable benefits on the owners." *Id.* at 1286. The court concluded that, "[i]n considering whether the owners that elected to enter into use agreements suffered a taking, available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs." *Id.* at 1287.

Third, the Federal Circuit held that the CFC had erred in not considering the duration of the legislation. It directed that, "[o]n remand, the court must consider that the owners * * * were only subjected to the legislation for a limited period of 19 to 27 months." *Cienega X*, 503 F.3d at 1288.

Finally, the Federal Circuit held that the CFC had erred in its treatment of the investment-backed-expectations prong of the *Penn Central* analysis. *Cienega X*, 503 F.3d at 1288. Although it found no error in the CFC's conclusion that the owners had subjectively expected to be allowed to prepay their mortgages after 20 years, it held that the CFC had erred "in part in its analysis of the reasonableness of the plaintiffs' expectations." *Ibid.*

On July 21, 2008, the Federal Circuit vacated the CFC's judgment in this case and remanded for further proceedings in accordance with *Cienega X*. Pet. App. 44a-46a. The court specifically noted that, on remand, "both sides" should be allowed "to supplement the record with additional relevant evidence if they wish to do so." *Id.* at 46a (quoting *Cienega X*, 503 F.3d at 1291). Petitioner sought this Court's review of that decision, but its petition for a writ of certiorari was denied. See 555 U.S. 1170.

5. In July 2009, the CFC held a three-day trial to allow the parties to supplement the record. Pet. App. 50a. The court issued its opinion and entered judgment on January 28, 2010. *Id.* at 47a-143a.

The CFC first addressed petitioner's breach-of-contract claim. Pet. App. 66a-86a. The government objected that consideration of that claim was contrary to the court of appeals' mandate and that the claim had been waived when it was not presented at the 2006 trial. *Id.* at 67a n.14. The CFC overruled these objections. *Ibid.* The court concluded, however, that petitioner's breach-of-contract claim failed on the merits because the government was not in privity with petitioner with regard to petitioner's contractual right to prepay its mortgage after 20 years. *Id.* at 86a.

With respect to petitioner's taking claim, the CFC held that the Preservation Statutes had effected a temporary regulatory taking of petitioner's property under *Penn Central*. Pet. App. 86a-139a. Using an *ex post* approach that valued petitioner's prepayment right at the end of the temporary taking, the court awarded compensation in the amount of $714,430, plus compound interest and attorney fees. *Id.* at 139a-142a.

6. The United States appealed the CFC's determination that a taking had occurred, as well as the court's calculation of damages. Petitioner cross-appealed the CFC's dismissal of petitioner's breach-of-contract claim. In November 2011, the Federal Circuit affirmed the dismissal of the contract claim and reversed the finding of a regulatory taking. Pet. App. 1a-20a.

With respect to petitioner's taking claim, the court of appeals considered the three "factors set forth in *Penn Central*: (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Pet. App. 7a (quoting *Penn Central*, 438 U.S. at 124) (alterations omitted).

In evaluating the economic impact of the Preservation Statutes, the court of appeals recognized that the parties had stipulated, in light of *Cienega X*, to an 18% reduction in the property's value, before any offsetting benefits were taken into account. Pet. App. 8a. The court agreed with the CFC's conclusion that the government had failed to establish that any offsetting benefits were more than "speculative." *Id.* at 8a-10a.[1] While

[1] Judge Dyk dissented from that aspect of the court of appeals' decision. He explained that petitioner bore the burden of proof on the economic-impact analysis, including with respect to the value of any

recognizing that "there is no per se rule" about what diminution of value suggests the existence of a regulatory taking, the court concluded that, "[i]n light of the facts of this case," an 18% impact was not "sufficiently substantial to favor a taking." *Id.* at 10a.

The court of appeals also rejected petitioner's argument that the 18% figure understated the relevant economic impact because that impact should be evaluated only in relation to "the time [the regulation] was in effect" (here, a five-year period). Pet. App. 11a. The court held that it was bound by *Cienega X* to measure economic impact "against the total value over the remaining life of the property" (*i.e.*, the last 20 years of the mortgage). *Id.* at 11a-12a. The court suggested that application of a similar approach across the board "would virtually eliminate all regulatory takings," but it stressed that the "application" of *Cienega X* "is limited to the ELIHPA and LIHPRHA cases." *Id.* at 12a.

The court of appeals next considered the extent to which the Preservation Statutes interfered with petitioner's reasonable investment-backed expectations. Pet. App. 13a-15a. The court held that petitioner had failed on remand "to demonstrate it was objectively reasonable to view the 20 year prepayment clause as the but for or primary reason for investment." *Id.* at 15a. The court therefore held that the investment-backed-expectations factor weighed against a taking here. *Ibid.*

In considering the character of the government's action, the court of appeals held that *Cienega X* had not

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offsetting benefits. Pet. App. 22a-29a. In light of the expert evidence introduced by the government on remand, Judge Dyk concluded that "[t]he economic impact" of the Preservation Statutes on petitioner's property had been "far less severe than the 18% figure." *Id.* at 35a-36a.

disturbed previous findings that the Preservation Statutes "had a character that supports a holding of a compensable taking." Pet. App. 15a-16a (quoting *Cienega VIII*, 331 F.3d at 1340). The court nevertheless affirmed the CFC's conclusion that this factor was not, taken alone, "dispositive." *Id.* at 16a (quoting *id.* at 95a). In light of its conclusion that "the other factors weigh against a taking," the court held that petitioner had "failed to establish that the denial of [its] prepayment right constituted a regulatory taking" under *Penn Central*. *Ibid.*

Finally, with respect to petitioner's breach-of-contract claim, the court of appeals held that the case could not be distinguished from the facts of *Cienega IV*, *supra*. Pet. App. 16a-19a. The court in *Cienega IV* had held that, with respect to prepayment rights, there was no privity of contract between the property owner and the government because the only prepayment provision was contained in a mortgage note to which the United States was not a party. 194 F.3d at 1243. The court in this case explained that it was bound to follow *Cienega IV* even though the CFC and the Tenth Circuit had criticized that decision. Pet. App. 17a-19a.[2]

Petitioner filed a petition for rehearing, which was denied on February 9, 2012. Pet. App. 235a-236a.

ARGUMENT

Applying the *ad hoc* balancing test established in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), the court of appeals rejected petitioner's contention that the Preservation

[2] Judge Dyk noted his "disagreement" with this aspect of the court of appeals' analysis "to the extent that it seeks to cast doubt" on *Cienega IV*. Pet. App. 43a n.10.

Statutes had effected a regulatory taking of petitioner's property. The court's resolution of that issue is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner identifies a narrow disagreement between the Federal and Tenth Circuits bearing on the proper disposition of its breach-of-contract claim. That disagreement turns on the application of settled legal principles to idiosyncratic facts, however, and the question is unlikely to recur because no other breach-of-contract claims remain pending under the Preservation Statutes. Further review is not warranted.

1. Petitioner contends (Pet. 18-19, 20-24) that the Preservation Statutes effected a "government-authorized physical invasion of [petitioner's] property" and therefore effected a taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. 20. Petitioner criticizes (Pet. 21) the Federal Circuit's decision in *Cienega Gardens* v. *United States*, 265 F.3d 1237 (2001) (*Cienega VI*), that ELIHPA and LIHPRHA did not "give rise to a physical occupation of the [o]wners' property as required to show a *per se* taking," *id.* at 1248.

a. Petitioner did not press its challenge to *Cienega VI* in the Federal Circuit, and that court did not pass upon the question in petitioner's case. Although petitioner argued *in the CFC* "that *Cienega VI* had been wrongly decided and that the court should find a physical taking under *Loretto*," Pet. 21 n.5, petitioner did not renew that argument in the Federal Circuit. To the contrary, petitioner sought to distinguish *Cienega VI* on the ground that petitioner was, "on appeal, * * * pro-

ceed[ing] under *Penn Central*, not a *per se* theory." Pet. C.A. Principal and Response Br. 23 n.8.[3]

It is therefore unsurprising that the Federal Circuit in this case did not mention its earlier decision in *Cienega VI* and did not address whether the Preservation Statutes effected a "physical invasion." Rather, consistent with the CFC's decision and with petitioner's own argument on appeal, the Federal Circuit simply stated that "the character of the governmental action" here "weighs in favor of a finding of a regulatory taking" under *Penn Central*. Pet. App. 16a (quoting *id.* at 95a). Because petitioner's current allegation of a "physical invasion" (Pet. 24) and consequent per se taking was neither pressed nor passed upon in the court of appeals, that contention is unfit for this Court's review. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (explaining that the Court generally declines "to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it").[4]

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[3] By contrast, with respect to the impact of *Cienega IV* on petitioner's breach-of-contract claim, petitioner argued that, if the panel "considers itself bound by *Cienega IV*," then it "should recommend that this case be heard *en banc*" because "*Cienega IV* deserves to be overruled." Pet. C.A. Principal and Response Br. 69.

[4] In *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), the Court observed that it was not jurisdictionally barred from considering two different arguments in favor of a taking—one "by physical occupation" and one "by regulation"—when the petitioner had "raised a taking claim in the state courts." *Id.* at 535; see *United States* v. *Williams*, 504 U.S. 36, 44 n.5 (1992) (suggesting that "greater restraint in applying our 'pressed or passed upon' rule" is appropriate when a case comes from state rather than federal court). *Yee* does

b. Even if petitioner's physical-taking argument had been presented to or addressed by the Federal Circuit, it would not warrant this Court's review, because there is no disagreement in the lower courts and petitioner's argument lacks merit.

Petitioner does not allege that the decision in *Cienega VI* conflicts with that of any other court of appeals. See Pet. 20-24. Petitioner's allegation of intra-circuit "incoheren[ce]" invokes stray statements in other Federal Circuit opinions suggesting that the Preservation Statutes had an effect akin to a physical invasion or an appropriation of real property rights. The Federal Circuit decisions on which petitioner relies, however, did not hold that the Preservation Statutes effected a per se taking or that other aspects of *Penn Central*'s *ad hoc* test were irrelevant to the takings analysis. See Pet. 22-23 (discussing *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003) (*Cienega VIII*), and *Palmyra Pac. Seafoods, LLC* v. *United States*, 561 F.3d 1361 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 2402 (2010)).

c. There is also no merit to petitioner's contention (Pet. 23) that the decision in *Cienega VI* "conflict[s]" with this Court's decisions in *Loretto* and *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). The categorical rule announced in *Loretto* is a "relatively narrow" one that applies only "where government requires an owner to suffer a permanent physical invasion of her proper-

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not support petitioner's request for review here. In *Yee*, after addressing the physical-taking argument, the Court refused to consider the property owner's regulatory-taking argument, on the ground that it had not been addressed by the state court "in the first instance." 503 U.S. at 537-538; see *id.* at 537 ("Consideration of whether a regulatory taking occurred would not assist us in resolving whether a physical taking occurred as well.").

ty." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); see *Loretto*, 458 U.S. at 432 n.9. Here, the restrictions imposed by LIHPRHA were indisputably temporary. See Pet. 7 (acknowledging that the HOPE Act restored petitioner's prepayment rights after five years). As a result, *Loretto*'s rule would be inapplicable even if those restrictions were tantamount to a physical invasion of petitioner's property. And the lower courts' refusal in this case to treat petitioner's allegation of a physical invasion as "dispositive," Pet. App. 16a (quoting *id.* at 95a), cannot conflict with *Kaiser Aetna*, in which the Court found that there had been "an actual physical invasion of [a] privately owned marina," 444 U.S. at 180. Rather than rest its holding on that fact alone, the Court in *Kaiser Aetna* addressed other factors as well and expressly declined to decide "whether in some circumstances" any one "factor[] by itself may be dispositive" of the regulatory-taking analysis. *Id.* at 178 n.9.

In any event, LIHPRHA did not, even for a temporary period, altogether eliminate owners' "right to exclude others." Pet. 22 (citing *Kaiser Aetna*, 444 U.S. at 179-180). It simply regulated their contractual options to prepay their mortgages, allowing prepayment upon certain conditions and permitting owners to sell their properties and exit the program.[5] Furthermore, *Kaiser*

[5] LIHPRHA allowed an owner to sell its property to a "qualified purchaser" at the "fair market value of the housing based on the highest and best use of the property" (*i.e.*, the project's market value without HUD restrictions). 12 U.S.C. 4103(b)(2), 4110(b)(1). To facilitate such sales, which would release owners from the program entirely, HUD funded virtually all transaction costs, provided mortgage insurance, and paid consultants to assist the parties. 12 U.S.C. 4110(d). HUD also provided loans and grants that enabled non-profit organizations to acquire projects. *Ibid.* An owner seeking to sell was allowed to prepay and exit the program if it did not receive a bona

Aetna involved the government's claim that the owner's dredging had converted its property into "a navigable water of the United States," thereby precluding the owner from denying access to the public at large. 444 U.S. at 168. Here, by contrast, the individuals on petitioner's property were already lessees. Although the Preservation Statutes imposed some limitations on petitioner's "ability to remove existing tenants and approve new tenants," petitioner "retained the ability to select tenants within the eligible group of low and moderate income individuals, to evict tenants for cause, and even to leave the units vacant." Pet. App. 40a, 92a; see *id.* at 92a (explaining that petitioner "did not become subject to a public easement, nor was its right to exclude others from its property wholly abolished").

Petitioner's reliance (Pet. 23-24) on *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), and *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), is also misplaced. The Court in *Yee* suggested that a categorical taking might occur if an owner were compelled "to refrain *in perpetuity* from terminating a tenancy," 503 U.S. at 528 (emphasis added), but nothing in LIHPRHA imposed such a long-term requirement. In both *Yee* and *Florida Power*, moreover, this Court recognized a crucial distinction between tenants who are initially "invited" in by the owner (as here), and those who are "forced upon [the owner] by the government." *Ibid.*; see *Florida Power Corp.*, 480 U.S. at 252-253. As in those cases, LIHPRHA's regulations on the use of petitioner's property were not tantamount to physical occupations that would trigger *Loretto*. See

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fide offer within specified time frames, if HUD decided not to provide financial assistance in connection an approved offer, or if the purchaser was unable to consummate the transaction for any other reason. 12 U.S.C. 4114(a).

Yee, 503 U.S. at 539; *Florida Power Corp.*, 480 U.S. at 253. As this Court has previously summarized, a regulation that "merely prohibits landlords from evicting tenants unwilling to pay a higher rent" or "bans certain private uses of a portion of an owner's property * * * does not constitute a categorical taking." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-323 (2002) (citations omitted).

2. Petitioner contends (Pet. 24-35) that the Federal Circuit, in this and other decisions, has adopted an overly rigid approach to regulatory-taking analysis under *Penn Central*. Petitioner describes the Federal Circuit's methodology as an "inflexible" "check-the-box" approach that "contraven[es]" this Court's decisions by imposing four unvarying requirements on taking claimants. Pet. 25.

Petitioner cites nothing in the decision below to show that the Federal Circuit is rigidly bound to apply each aspect of its analysis here to other alleged regulatory takings. In fact, to the extent that petitioner relies on misgivings that the Federal Circuit voiced about the application of *Cienega X* (see Pet. 18-19, 30, 34-35), the decision below strongly indicates that the court viewed suits involving the Preservation Statutes as a discrete category among regulatory-taking cases. When discussing economic impact—which accounts for three of the four purportedly "invented requirements" about which petitioner complains (Pet. 25)—the Federal Circuit stated that its "application" of *Cienega X* "is limited to the ELIHPA and LIHPRHA cases." Pet. App. 12a.

In any event, petitioner does not identify any disagreement among the courts of appeals about the relevance of the four "requirements" to which it objects. Nor is there merit to petitioner's criticisms (Pet. 25-35)

of the Federal Circuit's consideration (or supposed consideration) of those four particular factors in the course of making the "essentially ad hoc, factual inquiries necessary to determine whether a regulatory taking has occurred." *Yee*, 503 U.S. at 529 (citation and internal quotation marks omitted).

a. Petitioner principally objects (Pet. 25-28) to the Federal Circuit's decision to evaluate the economic impact of a temporary regulation by reference to "the value of the property as a whole," rather than to "the discrete time period that the [alleged] taking was in force." Pet. App. 7a-8a. But the importance of considering the parcel as a whole is well established in this Court's regulatory-taking cases, including *Penn Central* itself. There the Court specifically rejected, as "quite simply untenable," an economic-impact analysis that would evaluate the affected property right in isolation. 438 U.S. at 130. As the Court later elaborated, "a claimant's parcel of property [cannot] first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete," because "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety." *Concrete Pipe & Prods. of Calif., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993); see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987). In other words, restricting the economic-impact analysis to the period of the alleged taking would flout *Penn Central* by transforming every "delay" into a "total ban." *Tahoe-Sierra Pres. Council*, 535 U.S. at 331.

Petitioner contends (Pet. 26) that, because the claimants in *Tahoe-Sierra Preservation Council* alleged a "categorical" taking rather than a regulatory taking, the

parcel-as-a-whole principle applied in that case is inapposite here. In analyzing both kinds of claims, however, a court must define the relevant property interest, and this Court has previously applied the parcel-as-a-whole principle in evaluating regulatory-taking claims. See, *e.g.*, *Concrete Pipe & Prods.*, 508 U.S. at 643-644. That approach reflects the common-sense insight that a short moratorium or temporary regulation should be less likely to constitute a taking than a longer or permanent restriction. Petitioner's contrary approach would transform temporary restrictions into takings by artificially lowering the value of the parcel as a whole—precisely the gambit that this Court rejected in *Concrete Pipe and Products* and *Penn Central*.

b. Petitioner contends that the Federal Circuit adopted a "rigid rule" (Pet. 29) that an economic impact will establish a regulatory taking only if it passes "some minimum loss, apparently on the order of 75%" (Pet. 28). The decision below, however, contains no such requirement. To the contrary, the court specifically explained that "there is no per se rule" for establishing when an "economic impact qualifies as sufficiently substantial to favor a taking." Pet. App. 10a. While the court did observe that "no case * * * has found a taking where diminution in value was less than 50 percent," its specific conclusion was simply that the 18% diminution that it thought petitioner had suffered here was not sufficient to support a regulatory-taking claim "[i]n light of the facts of this case." *Ibid.* That conclusion was fully consistent with this Court's decisions. The Court has found no taking where the economic impact was 46%, see *Concrete Pipe & Prods.*, 508 U.S. at 645, and has acknowledged that "in at least some cases the landowner with 95% loss will get nothing," *Lucas* v. *South Carolina*

Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) (emphasis omitted).

c. Petitioner challenges (Pet. 31-33) the Federal Circuit determination that the court's calculation of economic impact should reflect any offsetting benefits that the statute made available to the property owner. As petitioner recognizes, however, that legal determination "had no impact in this case because the [Federal Circuit] majority * * * accepted the [CFC's] factual finding that the statutory benefits here were 'speculative.'" Pet. 31; see Pet. App. 8a-10a. Although the government disagrees with the majority's factual premise for the reasons stated in Judge Dyk's dissent (*id.* at 29a-36a), this Court should not grant certiorari to address a legal proposition that had no effect on the judgment below.[6]

d. Petitioner contends (Pet. 33-35) that the Federal Circuit erred in requiring petitioner to provide evidence of industry practice to establish whether LIHPRHA interfered with its reasonable investment-backed expectations. Petitioner suggests (Pet. 35) that the Federal Circuit irrationally required petitioner to prove an "industry-wide expectation" when "investment expectations differed widely depending on the location of the

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[6] On the merits, petitioner's objection to the consideration of offsetting benefits is not supported by this Court's decisions. Petitioner relies primarily (Pet. 32-33) upon Justice Scalia's concurring opinion in *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). But the transferable development rights at issue in *Suitum* were not comparable to the sale or incentive options provided by LIHPRHA because those development rights had "nothing to do with" the owner's use of the relevant property, and instead pertained to separate properties. *Id.* at 747 (Scalia, J., concurring). By contrast, the options to sell or to seek incentives that LIHPRHA provides significantly ameliorate the overall impact of the Preservation Statutes on the owner's rights in the very property at issue.

real property and its condition." The Federal Circuit recognized, however, "that there can potentially be multiple objectively reasonable investment strategies dictated by geography, economics, or other factors." Pet. App. 13a. The court simply concluded that, on the record in this case—in which petitioner had full notice that it could introduce new evidence on remand to address this aspect of *Cienega X*, see Pet. App. 46a; *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1290 (Fed. Cir. 2007), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008)—petitioner had failed to "present sufficient evidence * * * that it was objectively reasonable for [petitioner] to view the 20 year prepayment clause as the primary or 'but for' reason for investment." Pet. App. 14a. That fact-specific evidentiary conclusion raises no issue of broad importance that might warrant this Court's review.

3. Finally, petitioner contends (Pet. 36-37) that the Federal Circuit erred in affirming the dismissal of petitioner's breach-of-contract claim on the ground that "HUD lacked privity of contract" with petitioner on the term that permitted prepayment of the mortgage after 20 years. Although petitioner identifies a narrow split in the courts of appeals on the factual circumstances in this case, the issue does not warrant this Court's review. The Court's resolution of the question would not affect other cases, and petitioner presents, at best, an argument that the Federal Circuit misapplied "a properly stated rule of law," Sup. Ct. R. 10, to facts that are very unlikely to recur.

a. As in other cases arising under the Section 221(d)(3) Program, the underlying transaction here involved three documents: a regulatory agreement between petitioner and HUD, a mortgage between peti-

tioner and its lender, and a secured note between petitioner and its lender. Pet. App. 17a. Although those three documents included cross-references or incorporation clauses where appropriate, see *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1240-1241 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) (*Cienega IV*), the regulatory agreement—the only document to which HUD was a party—did not "mention prepayment of the mortgage loan or incorporate any agreement or provision addressing prepayment," *id.* at 1242. In *Cienega IV*, the Federal Circuit recognized that all three documents "were part of the same transaction" and that "all of the agreements before us are relevant in determining the meaning of each" of them. *Id.* at 1243. In light of the careful structuring of the documents memorializing the transaction, however, the court concluded that the prepayment term in the note between the lender and the property owner should not be "read * * * into the regulatory agreement between HUD and the Owner." *Ibid.* As a result, the court held, "the contract documents simply do not show privity of contract between the Owner[] and HUD with respect to a right to prepay the mortgage loans after twenty years without HUD approval." *Ibid.*

Petitioner does not dispute the Federal Circuit's conclusion that it was bound in this case to follow *Cienega IV*. Pet. App. 19a.[7] Petitioner instead contends that the court in *Cienega IV* erred because it "failed to follow 'black letter contract law that multiple documents, exe-

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[7] The majority suggested that it might disagree with *Cienega IV*, in that it described the CFC's criticism of that opinion as "exceedingly thoughtful." Pet. App. 17a. Judge Dyk expressly disagreed with the majority "to the extent that it [sought] to cast doubt on" *Cienega IV*. *Id.* at 43a n.10.

cuted contemporaneously and relating to the same transaction should be read together to determine the intent of the parties.'" Pet. 37 (quoting Pet. App. 71a, citing *Joy* v. *St. Louis*, 138 U.S. 1 (1891)). But the *Cienega IV* court expressly recognized that very principle, quoting Restatement (Second) of Contracts § 202(2) (1981) for the proposition that "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." 194 F.3d at 1243. Accordingly, petitioner's complaint reduces to the proposition that the Federal Circuit erroneously applied a correctly stated rule of law to the facts of *Cienega IV* (and of this case).

Petitioner invokes (Pet. 36) this Court's decision in *Joy*, *supra*, but the circumstances of that case are distinguishable from those here. Although *Joy* happened to involve a transaction that was reflected in two agreements and a deed, the Court held merely that the terms of the transaction could be enforced against the successors of the "Kansas City company" when the Kansas City company had been a signatory to both agreements and the deed. 138 U.S. at 4-11, 38-40. Because the Kansas City company had signed all three documents, the Court had no occasion to decide whether a party should be held to a contractual obligation in an agreement it did not sign merely because it signed a related agreement at the same time.

b. Petitioner notes (Pet. 36) that the Tenth Circuit has disagreed with *Cienega IV*'s privity holding. See *Aspenwood Inv. Co.* v. *Martinez*, 355 F.3d 1256, 1260 (2004). Although that narrow disagreement arose on materially similar facts (arising from a 1970 transaction with HUD), the issue does not warrant further review because it is of no significant prospective importance.

The complex contractual arrangement at issue in these cases has not been used by HUD since the early 1970s. Moreover, since this Court declined to review the privity-of-contract decision in *Cienega IV*, see *Sherman Park Apts.* v. *United States*, 528 U.S. 820 (1999), similar breach-of-contract claims by other Section 221(d)(3) Program participants have already been dismissed. See, *e.g.*, *Greenbrier* v. *United States,* 193 F.3d 1348, 1355 (Fed. Cir. 1999) ("Our holding in *Cienega Gardens* is dispositive of the issue concerning whether the Owners in this case were in privity of contract with the government with respect to the prepayment terms found in their mortgage notes."), cert. denied, 530 U.S. 1274 (2000); *Chancellor Manor* v. *United States*, 331 F.3d 891, 901 (Fed. Cir. 2003) ("In short, there is simply no evidence that the United States was a party to any agreement containing the prepayment terms."). Indeed, petitioner's case is now the only remaining breach-of-contract claim under the Preservation Statutes. Under those circumstances, this Court's review of petitioner's factbound argument about the proper interpretation and enforcement of the three documents in this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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