No. 11-1352

IN THE

Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICI CURIAE* PLAINTIFFS IN *ANAHEIM GARDENS ET AL. v. UNITED STATES*, CASE NO. 93-655C (FED. CL.) AND *ALGONQUIN HEIGHTS ET AL. v. UNITED STATES*, CASE NO. 97-582 (FED. CL.) IN SUPPORT OF GRANTING THE PETITION

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

I. INTEREST OF *AMICI CURIAE*[1]

This brief in support of Petitioner CCA Associates is submitted on behalf of 68 *amici curiae* plaintiffs in two related cases currently pending in the Court of Federal Claims. These cases are *Anaheim Gardens et al. v. United States*, Case No. 93-655C and *Algonquin Heights et al. v. United States*, Case No. 97-582 (*amici curiae* shall be referred to in this brief as the "Anaheim and Algonquin Plaintiffs"); a list of the Anaheim and Algonquin Plaintiffs is included in the Appendix hereto. Combined, the Anaheim and Algonquin Plaintiffs own over 95 properties throughout various regions of the United States. Much like the Petitioner, the Anaheim and Algonquin Plaintiffs are owners and former owners of low-income multifamily rental housing who purchased their properties almost 40 years ago using federally insured mortgages. Also like the plaintiff in *CCA Associates*, the Anaheim and Algonquin Plaintiffs were unable to exercise their right to prepay their mortgages and terminate the HUD-imposed restrictions on rents and tenants as a result of the enactment of the Emergency Low Income Housing Preservation Act, Pub. L. 100-242, 100 Stat. 1877, codified at 12 U.S.C. § 1715l note ("ELIHPA"), and the Low Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), codified at 12 U.S.C.S. 4101 et seq. ("LIHPRHA")

1. The parties have consented to the filing of this brief and received timely notice of the Anaheim and Algonquin Plaintiffs' intent to do so. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

(together, ELIHPA and LIHPRHA are referred to in this brief as the "Preservation Statutes").

Amici curiae have a significant interest in the outcome of this case. Their cases have been pending in the Court of Federal Claims since 1993 and 1997 respectively. The *amici curiae* believe that the Federal Circuit's misapplication of regulatory takings law in *CCA Associates v. United States*, 667 F.3d 1239 (Fed. Cir. 2011) has distorted this Court's regulatory takings jurisprudence. *See* Pet'r's App. 1a-43a. As it currently stands, the Federal Circuit in *CCA Associates* has arbitrarily set forth and applied a different and incorrect set of regulatory takings standards to property owners seeking redress for the government's taking of their property.

Counsel for *amici curiae* have read CCA Associates' petition for certiorari. Having read the petition, counsel believes that the Anaheim and Algonquin Plaintiffs' analysis and considerations raised in this brief will help inform the Court that granting CCA Associates' petition is important and necessary to rectify the confusion created by the Federal Circuit and to demonstrate that *CCA Associates* poses a profound and widespread threat to the private property interests of many similarly situated parties.

II. BACKGROUND

The Anaheim and Algonquin Plaintiffs are owners of low-income multifamily housing properties who purchased their properties under two Federal programs – the Section 221(d)(3) and Section 236 mortgage insurance programs – intended to promote development of affordable housing. Pursuant to those programs, each of the Anaheim and Algonquin Plaintiffs also entered into regulatory agreements with the Department of Housing and Urban Development ("HUD") or its predecessor entity. *See*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1325 (Fed. Cir. 2003) ("*Cienega VIII*"). As a result of those regulatory agreements, each Anaheim and Algonquin Plaintiff agreed to abide by HUD-imposed affordability restrictions. *Id.* These restrictions included restrictions on the rents that could be charged to tenants, the income levels of tenants, and the rate of return that the owners could receive from their properties. *Id.* The regulatory agreements and mortgage insurance remained effective as long as the mortgages were not paid in full. *Id.* The Anaheim and Algonquin Plaintiffs were permitted to prepay their mortgages in full twenty years after the date of final endorsement of the mortgage by HUD without HUD's consent. *Id.* Upon prepayment of the mortgage, the HUD-imposed regulatory restrictions on the property would terminate and the owners would be free to alter the use of their properties by converting them to market rate properties, condominiums or other uses, thereby maximizing their value.

Concerned that mass attempts to prepay mortgages after the initial twenty-year period would result in a shortage of affordable housing, Congress, in 1988, enacted ELIHPA and later LIHPRHA. *Cienega VIII*, 331 F.3d at 1326. ELIHPA was an interim measure implemented by Congress until it could enact a more permanent solution. *Id.* Accordingly, three years later, Congress enacted LIHPRHA. *Id.*

Notwithstanding the provisions of the Anaheim and Algonquin Plaintiffs' mortgage notes and HUD regulations which allowed prepayment after twenty years, the Preservation Statutes effectively prohibited owners from exercising their prepayment rights. *Id.* at 1327. Specifically, the Preservation Statutes restricted the ability of owners, including CCA Associates and each of the Anaheim and Algonquin Plaintiffs, from exercising their right to prepay their mortgages by imposing onerous conditions on prepayment that were designed to prevent prepayment by any property that had an economically valid reason to do so, and gave HUD authority to approve prepayment requests, but only if insuperable conditions were satisfied. The Anaheim and Algonquin Plaintiffs have alleged, *inter alia*, that by enacting the Preservation Statutes, the United States committed a regulatory taking of their right to prepay their mortgages and for that, they are entitled to compensation under the Fifth Amendment.

As explained in more detail below, the Federal Circuit's precedent in the *CCA Associates* decision has changed the regulatory takings jurisprudence the Anaheim and Algonquin Plaintiffs previously understood governed their claims as a result of the Supreme Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and its progeny. Because the *CCA Associates* decision distorts this Court's jurisprudence on regulatory takings, it will adversely impact the Anaheim and Algonquin Plaintiffs, and it threatens to do more widespread damage if its holding is followed in other cases.

III. SUMMARY

The Petitioner does not stand alone. The Anaheim and Algonquin Plaintiffs were injured by the same regulatory taking of which the Petitioner complains, and the Federal Circuit's decision in *CCA Associates* threatens their rights in the same way. As explained in more detail below, the Federal Circuit has confused and misapplied this Court's holdings in *Penn Central* and other cases, misconstruing the elements necessary for claimants to prove that a regulatory taking has occurred. Specifically, the *CCA Associates* decision misconstrues the nature of economic impact that a person asserting a taking claim must show by focusing on the challenged regulation's impact on the lifetime value of the property, which is inconsistent with this Court's other holdings. The *CCA Associates* decision also misconstrues the distinct investment-backed expectations element of the *Penn Central* analysis, by requiring the claimant to show there was only one objectively reasonable expectation that supported its investment decision, and by judging the basis of the reasonableness investigation on industry-wide expectations, rather than the expectations associated with the specific investment at issue. Finally, the panel in *CCA Associates* recognized that its holding is inconsistent with other precedents of the Federal Circuit and this Court and seeks to treat persons asserting claims under the Preservation Statutes differently from other regulatory takings claimants.

There is no principled basis to treat these claimants differently from other persons asserting regulatory takings claims. Absent any such principled distinction, other courts considering regulatory takings matters will undoubtedly apply some or all of the *CCA Associates* holdings to their cases, threatening further injury to persons with legitimate claims and additional injury to this Court's regulatory takings jurisprudence. The Court should grant the petition for certiorari, which presents a unique opportunity to do justice to persons who have been litigating their claims for almost two decades and to reaffirm this Court's holdings with regard to regulatory takings generally.

IV. ARGUMENT

A. THE FEDERAL CIRCUIT IS WRONG TO REQUIRE THAT THE CALCULATION OF ECONOMIC LOSS FOR A TEMPORARY REGULATORY TAKING MUST USE THE VALUE OF THE ENTIRE REMAINING LIFE OF A PROPERTY

The Federal Circuit's decision in *CCA Associates* is unfaithful to this Court's decisions that set the standards for determining whether a regulatory taking of a private party's property has occurred. Although the Federal Circuit recognizes in *CCA Associates* that the regulatory takings analysis is governed by *Penn Central* and its progeny, it misapplies the law in a manner that renders the Circuit's regulatory takings law inconsistent with both the letter and spirit of this Court's decisions. In particular, the Federal Circuit's requirements for how to calculate economic impact and how to evaluate distinct investment-backed expectations – two key aspects of the *Penn Central* analysis – are flawed.

As this Court well knows, the first factor analyzed in the *Penn Central* takings analysis is the economic impact of the government regulation at issue on the value of a private party's property. This Court has never instructed courts tackling this issue as to the exact method used to calculate economic impact. Rather, the Court has been clear that the economic impact inquiry is part of an *ad hoc* inquiry that hinges on the specific facts and circumstances of a particular case. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (O'Connor, J., concurring) ("*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987) (Factual inquiries of the *Penn Central* test must be "conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."). Simply stated, courts are permitted under *Penn Central* and its progeny to use a variety of methods to assess how substantially a government regulation has impacted the financial value of a claimant's property. There is no one calculation or economic formula that is right or wrong so long as the purpose of the calculation or formula is to determine the magnitude of the property owner's inability to make a reasonable return on his or her property.

Although no quantitative analysis within *Penn Central* establishes hard-edged rules to evaluate these two elements, that decision repeatedly invokes the concept of a "reasonable return" as the benchmark for analysis, and concludes that "a use restriction on real property may constitute a taking [where it] has an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127.

Typically, assessment of economic impact involves some comparison of the financial impact of the challenged regulation against the value of the property involved – a comparison sometimes referred to as the "takings fraction." But as this Court has noted, since its decision in *Penn Central*, there has been a "difficult, persistent question of what is the proper denominator of the takings fraction." *Palazzolo*, 533 U.S. at 616. Some of the Court's precedents indicate that the extent of deprivation effected by a regulatory taking should be measured against the value of the parcel as a whole. *Id.* However, the Court has also noted some discomfort with that logic in other decisions. *Id.*

Here, the crux of the error that must be corrected is the Federal Circuit's misuse of the concept and measurement of the parcel as a whole, a misuse that started with the Federal Circuit's decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*") and that is perpetuated in *CCA Associates*. In particular, apparently attempting to apply a more rigorous mathematical test to determining economic impact, the *Cienega X* and *CCA Associates* decisions applied the takings fraction in a manner that misapplied this Court's precedents and led to bizarre and unjust outcomes.

Previously, the Federal Circuit applied the correct approach in determining economic impact in these cases. Thus, in *Cienega VIII*, the Federal Circuit in assessing the *Penn Central* economic impact requirement correctly focused on analyzing the financial loss the property owners experienced during the period of time when the offending regulations were in effect — i.e., from an individual owner's prepayment eligibility date through the date when the regulations were repealed. In *Cienega VIII*, the court compared the owners' returns while their properties were subject to the prepayment prohibition of ELIHPA and LIHPRHA to the owners' equity in the property. This comparison revealed that, during the period that their prepayment rights were blocked, the owners earned a mere .3% rate of return on their equity investments. 331 F.3d at 1342 & n.38. This was sufficient for the *Cienega VIII* court to find a taking had occurred. *Id*. at 1343 & n.39.

The Federal Circuit went astray in *Cienega X*, where a different panel of the Federal Circuit decided that the calculation used to assess the return on equity previously approved in *Cienega VIII* was not permitted under Supreme Court precedents. The *Cienega X* court reasoned that the *Cienega VIII* approach was improper because it only accounted for the economic impact during the period of the temporary taking and not over the lifetime of the property. In other words, the *Cienega X* court concluded that the denominator of the takings fraction had to be based on the lifetime value of the property, not just the value of the property during the period of the temporary taking.

The *Cienega X* panel based its "life of the property" requirement purportedly on this Court's decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). However that rationale is flawed because *Tahoe-Sierra*'s use of the life of the property was not related to measuring economic impact under the *Penn Central* analysis. Indeed, the *Penn Central* test was not applied in *Tahoe-Sierra* because the petitioners had asserted that the *Penn Central* test was "inapplicable" and that a categorical taking occurred, pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Tahoe-Sierra*, 535 U.S. at 325. Thus, when the Federal Circuit in *Cienega X* and

CCA Associates requires that the value of entire life of the property be used as the denominator in the takings fraction to determine whether a property owner's returns have been sufficiently eroded to constitute a taking under *Penn Central*, the Federal Circuit is misapplying not only its own precedent in *Cienega VIII*, but this Court's precedents as well.

There is no doubt that in *Penn Central*, this Court was clear that the parcel as a whole must be considered in weighing whether a regulatory taking has occurred. However, the parcel as a whole instruction of *Penn Central* does not translate into a directive that the calculation assessing the economic impact of a temporary regulation on property must use, as the denominator of the takings fraction, the value of the entire lifetime earnings of the property, rather than the period of the temporary taking. To the contrary, the *Penn Central* parcel as a whole concept is intended to instruct courts that they may not isolate the value of the loss of one element of the bundle of rights a private party may have in property separate and apart from the full bundle of property rights to assess the loss of property value caused by a regulation. The Federal Circuit's requirement that temporary loss of income must include income after the end of the taking (reflected in the denominator of the takings fraction) and be based on the lifetime value of a property, rather than the period of the temporary taking which reflects the actual injury that the owner suffered, distorts the economic impact analysis in a way that is unfair and inconsistent with this Court's precedents and the Constitution's promise that when property is taken by the Government the owner will be justly compensated. Consequently, the Court should grant the Petitioner's petition for certiorari to correct this wrong, and steer the Federal Circuit's regulatory takings law back on course.

B. THE FEDERAL CIRCUIT ERRED IN HOLDING THAT THERE MUST BE ONE "BUT FOR" REASON TO ESTABLISH INTERFERENCE WITH DISTINCT INVESTMENT-BACKED EXPECTATIONS

The second factor in the *Penn Central* analysis requires courts to assess the extent to which the regulation at issue interfered with the "distinct investment-backed expectations" of the claimant. *Penn Central*, 438 U.S. at 124; *accord Palazzolo*, 533 U.S. at 633-34. Investment-backed expectations are not "talismanic under *Penn Central*." *Palazzolo*, 533 U.S. at 635. Rather, they are one factor that helps to determine whether a regulation has gone too far. *Id.* As with all of the *Penn Central* factors there is no exact formula to be used to assess the level of a regulation's interference with investment-backed expectations. *Id.* at 636 ("As before, the salience of these facts cannot be reduced to any 'set formula.'") (O'Connor, J., concurring). As this Court has instructed, part of the investment-backed expectations inquiry may properly include consideration of the effect of the existing regulations to determine the reasonableness of the expectations. In all cases however, the plural language employed by the Court in stating what is required under this prong of the *Penn Central* analysis necessarily envisions the possibility that there may be more than one investment-backed expectation involved in a particular case. That fact does not, as the Federal Circuit has concluded in *CCA Associates*, bar a finding of a regulatory taking.

In *CCA Associates*, the Federal Circuit wrongly concludes that in a regulatory takings case, the claimant must prove that there was only one objectively reasonable expectation supporting an investment in order to establish a regulatory taking. Specifically, the Federal Circuit stated that there must be proof of an objectively reasonable "but for" *or primary* reason for the investment. Pet'r's App. 13a-14a. While giving a nod to the word "primary," in actuality, the Federal Circuit requires a "but for" reason for the investment to conclude a taking occurred. The problem with the "but for" articulation of the *Penn Central* investment-backed expectations requirement is that it is inflexible and inconsistent with this Court's precedent that clearly recognizes by the plural language it employs that more than one expectation can drive an investment. Moreover, it is internally inconsistent. When something is a primary reason, that does not mean that it is the only or "but for" reason for taking an action, however. "Primary" has multiple meanings, including "fundamental, elemental, [and] basic." *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY (2d College Ed. 1986). Thus, it is possible to have several "primary" reasons for making an investment. "Primary" does not mean the only or exclusive "but for" reason.

The Federal Circuit's approach also errs to the extent it requires evidence of industry-wide standards to prove an owner's investment-backed expectations. As originally formulated in *Penn Central*, this Court asked how the impinging regulation affected the owner's "distinct investment-backed expectation." *Penn Central*, 438 U.S. at 124. In later decisions, the formula was revised to refer to the owner's "reasonable investment-backed expectations." *See*, *e.g.*, *Palazzolo*, 533 U.S. at 617.

At all times, however, assessing the owner's investment-backed expectations focused on an evaluation of how the impinging regulation affected a specific investment. This approach was implicit in *Penn Central*'s analysis of "reasonable returns," and whether the impacts resulting from the alleged taking were sufficiently severe to defeat the owner's investment-backed expectations. In evaluating the investment-backed expectations, the focus is properly on the experience of an individual investor and a specific investment, because those are the expectations that are presumably being frustrated by the alleged taking.

Unfortunately, *Cienega X* and *CCA Associates* shifted the focus from an investment-specific analysis to an inquiry concerning only industry-wide expectations. *Cienega X*, 503 F.3d at 1290; Pet'r's App. 13a. In other words, the focus was on what the industry considered to be a reasonable investment, rather than what the "distinct" or "reasonable" expectations were for the particular investment at stake. While, as in this case, there may be a large number of owners who share a particular type of injury, in all cases, those injuries are suffered on a property-by-property basis by each owner. An industry does not suffer a taking; an owner does, and it makes no sense to ask, as *Cienega X* and *CCA Associates* do, what the industry considered to be "reasonable." To the extent they attempt to measure the "distinct" or "reasonable" investment-backed expectation by reference to industry standards that do not reflect the impact of an alleged taking on a specific property, *Cienega X* and *CCA Associates* depart from this Court's precedents and must be corrected by this Court.

Consequently, because the Federal Circuit has created an unnecessarily inflexible requirement inconsistent with this Court's precedents for assessing the level of interference with distinct investment-backed expectations, it should grant the petition for certiorari to correct the state of the law in the Federal Circuit.

C. THE PETITION SHOULD BE GRANTED TO CLARIFY FEDERAL REGULATORY TAKINGS LAW FOR PROPERTY OWNERS WHO ARE SIMILARLY SITUATED TO CCA ASSOCIATES

The decision of the Federal Circuit in *CCA Associates* must be reviewed to provide clarity to property owners who are similarly situated to CCA Associates. A significant number of property owners, including the *amici curiae* hereto, were similarly impacted by the Preservation Statutes. Many of these property owners have been seeking relief from economic injury caused by ELIHPA and LIHPRHA for approximately 20 years.

Since the Court's decision in *Tahoe-Sierra*, the Court has not provided any further guidance to lower courts about applying the *Penn Central* framework. In *Tahoe-Sierra*, the Court reaffirmed that the "polestar" in partial regulatory takings cases "remains the principles set forth in *Penn Central…*," without opportunity to clarify the application of the *Penn Central* framework. 535 U.S. at 321; *accord Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005). Lower courts are left to muddle through the ad hoc inquiries of *Penn Central*.

That courts have struggled to apply the *Penn Central* framework is apparent in the decision of the Federal Circuit. Repeatedly, the majority panel in *CCA Associates* expressed its extreme disdain for the rule that emerged from *Cienega X*:

> In *Cienega X*, we deviated from the traditional lost rent or return on equity approach, and instead required that the lost income be compared to all of the money the property would earn over its remaining life. We are bound by *Cienega X*, but note that its application is limited to the ELIHPA and LIHPRHA cases. While the parties may be correct that . . . there is a conflict between *Cienega VIII* and *Cienega X*, and that this analysis was not required by *Tahoe-Sierra*, it is clearly required by *Cienega X*, and we are bound to follow that case.

Pet'r's App. 12a. Thus, the Federal Circuit appears to acknowledge that this case calls for clarification from the Supreme Court because cases in the Federal Circuit are contradictory, and *Cienega X* and now this case employ an analysis that "was not required by *Tahoe-Sierra*." Pet'r's App. 13a. Indeed, in a footnote, the Federal Circuit criticizes application of *Tahoe-Sierra* in *Cienega X*. Pet'r's App. 11a-12a at n.3.

The internal inconsistencies in Federal Circuit precedent leave similarly situated parties, like the *amici curiae* hereto, in an uncertain and untenable situation in which the precedential effect of both *Cienega VIII* and *Cienega X*, as well as Supreme Court cases concerning regulatory takings, is tenuous and conditional. Indeed, Circuit Judge Dyk, dissenting-in-part, pointed to other contradictions between *Cienega X* and this case. Pet'r's App. 21a-22a (concurring in the judgment and dissenting-in-part) (discussing the burden of proof with respect to the economic impact analysis under the *Penn Central* framework). The plaintiff in *CCA Associates* and the 68 Anaheim and Algonquin Plaintiffs should not be subjected to regulatory takings rules that even the majority panel in *CCA Associates* admits are fundamentally flawed and inconsistent with this Court's holdings.

Nor should these plaintiffs have to follow rules that apply only to them and not to other regulatory takings claimants. There is no principled distinction offered by the Federal Circuit between ELIHPA and LIHPRHA cases and all other regulatory takings cases that would warrant limitation of the economic injury reasoning and methodology employed to ELIHPA and LIHPRHA cases. This uncertainty and selectivity in the law is particularly troubling because most regulatory takings cases are brought in the Court of Federal Claims and thus controlled by Federal Circuit precedent. *See* 28 U.S.C. § 1295(a)(2) (granting exclusive appellate jurisdiction to the Federal Circuit over certain cases in which the United States is defendant). While the *CCA Associates* court asserted, in dictum, that the case governs only claims arising under the Preservation Statutes (Pet'r's App. 12a), that dictum may not offer any limiting principle to future courts considering regulatory takings claims. The court failed to offer a principled basis for treating these claims differently from other regulatory takings claims. In the absence of such a principled distinction – assuming that a principled distinction were possible – other courts will not know how to address analogous questions concerning economic impact, investment-backed expectations, and related *Penn Central* issues in other regulatory takings cases. Unavoidably, the injury that the *CCA Associates* decision does to this Court's regulatory takings jurisprudence will spread and adversely affect other claimants. The Court must grant the petition for certiorari to prevent

CCA Associates from misleading other courts' regulatory takings decisions.

The Federal Circuit has applied the *Penn Central* factors, particularly the economic injury factor, in inconsistent ways that "obfuscate standard economic methods" and result in jurisprudential disarray. William W. Wade, *Sources of Regulatory Takings Confusion Subsequent to Penn Central*, 41 E.L.R. 10936, 10938 (2011), *available at* http://landuselaw.wustl.edu/articles/A%20Wade%20Penn%20Central%20Article.pdf. In particular, *Cienega X* and *CCA Associates* are divorced from standard economic analyses because they apply the wrong denominator for the takings fraction. *See id.* at 10938-10945. They also depart from Supreme Court and prior Federal Circuit precedent. *See supra*, Section IV.A. The result is that "practicing lawyers have no predictable way to evaluate the merits of a takings claim." *Id.* at 10937; *accord* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 735 (2011) (describing application of *Penn Central* as being "random and unpredictable as a game of chance").

The only solution to this untenable state of regulatory takings jurisprudence is for the Court to clarify the *Penn Central* framework and its application. Indeed, this case provides an ideal vehicle for the Court to correct the misapplication of *Penn Central* and *Tahoe-Sierra* that began in *Cienega X* and has now been extended further and reaffirmed.

V. CONCLUSION

For the reasons stated above, the Anaheim and Algonquin Plaintiffs ask the Court to grant CCA Associates' petition for certiorari and to clarify and reaffirm its holdings in *Penn Central* and its progeny.

Respectfully submitted,

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APPENDIX

APPENDIX A — LIST OF *AMICI CURIAE*

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Anaheim Gardens, L.P.

B-L Associates, L.P.

Joseph R. Biafora and Stefi Biafora

Brandy Hill Company

Briar Crest

Briar Crest II

Briar Hill

Brookside Manor Associates, L.P.

Buckman Gardens, L.P.

Cambridge Square North

Cambridge Square of Fort Wayne

Cambridge Square of Grand Rapids I

Cambridge Square of Grand Rapids II

Carriage House North

Carriage House of Elkhart

Carriage House of Mishawaka I

Carriage House of Mishawaka II

Carriage House of Muskegon

Carriage House South

Carriage House West I

Carriage House West II

Carriage House West III

Carriage House West IV

Cedar Gardens Associates

Chauncy House Company

Country Towne Partnership

Cromwell Court Company

C-W Associates, L.P.

Dolly Ann Apartments, L.P.

Emory Grove Associates, L.P.

First Landmark Associates, L.P.

5324 Foothill Apartments, G.P.

Forest Glen Limited Dividend Housing Association

Fort Heath Associates

Garrison Forest Associates I & II

Glenarden, L.P.

Glenview Gardens, L.P.

Halawa View Apartments, G.P.

Peter H.Y. Hsi and Priscilla L.F. Hsi d/b/a General Partners of Waipahu Tower, L.P.

Indian Head Manor Limited Partnership I

Jodani Associates, L.P.

Kimberly Associates, L.P.

Kings Grant Company

Leader House Associates, L.P.

Leader Housing Co., Inc.

Metro West, L.P.

Millwood Associates Limited Partnership

Napa Park, L.P.

New Amsterdam Associates, L.P.

New Amsterdam Houses, Inc.

Ontario Townhouses, L.P.

Pine Crest Company

Riverside Village Company

Rock Creek Terrace Limited Partnership

825 San Tomas Apartments, L.P.

Sierra Vista One, L.P.

3740 Silverlake Village, L.P.

620 Su Casa Por Cortez, G.P.

Suburbia Associates, L.P.

Suehar Associates, L.P.

The Palomar Apartments, L.P.

The United Company, L.P.

Appendix A

Thetford Properties III, Limited Partnership

Thetford Properties IV, Limited Partnership

Tower West Associates, L.P.

Tower West, Inc.

Town & Country Apartments and Townhomes