

No. 11-1352

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In the  
**Supreme Court of the United States**

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CCA ASSOCIATES,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF PETITIONER**

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R. S. RADFORD  
*Counsel of Record*  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747  
E-mail: [rsr@pacificlegal.org](mailto:rsr@pacificlegal.org)

*Counsel for Amicus Curiae*  
*Pacific Legal Foundation*

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## QUESTION PRESENTED

Whether the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking of Petitioner's property, without just compensation, in violation of the Fifth Amendment of the Constitution, under either the *Loretto per se* physical takings test or the *Penn Central* regulatory takings test?

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner, CCA Associates.<sup>1</sup>

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. Representing the views of thousands of members and supporters, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property.

PLF attorneys have litigated many leading cases before this Court and around the nation arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. PLF attorneys were counsel of record before this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

PLF and its supporters recognize that the Takings Clause provides crucial safeguards for the

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<sup>1</sup> All parties have consented to the filing of this brief. Counsel of record for all parties received notice of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution specifically for the preparation or submission of this brief.

rights of property owners against predatory and overreaching government regulations. The decision of the Federal Circuit in this case, if allowed to stand, could effectively eliminate the doctrine of temporary takings from this Court's jurisprudence. For that reason, PLF's board of trustees, a majority of whom are attorneys, have authorized the filing of this brief urging this Court to grant the petition for a writ of certiorari.

### STATEMENT OF THE CASE

This case raises the question of whether the federal government can conscript private property for use as low-income housing for a period of more than five years, without incurring liability for a taking.

Under the 1961 amendments to the National Housing Act, Petitioner, like many other property owners, was induced to build and operate an apartment complex as low-income housing. Petitioner's Appendix (App.) 5a. As incentive for Petitioner's agreement to lease its apartments at below-market rents, the federal government provided mortgage insurance and interest subsidies. Importantly, this agreement included a "prepayment" provision, by which Petitioner could prepay the mortgage and regain complete control of its property after twenty years. *Id.*

But as the twenty-year mark approached, the government enacted the Emergency Low Income Housing and Preservation Act of 1987 (ELIHPA), imposing a two-year moratorium on prepayments beginning in 1988. Then, the government enacted the Low-Income Housing Preservation and Resident

Homeownership Act of 1990 (LIHPRHA), indefinitely cancelling prepayment rights. Petitioner and other similarly situated property owners were effectively compelled to continue providing low-income housing after the twenty-year prepayment date had come and gone.

Petitioner sued the government, alleging *inter alia* that ELIHPA and LIHPRHA effected a compensable taking under the Takings Clause of the United States Constitution. Shortly thereafter, in 1996, LIHPRHA was repealed. This established a terminus date for the compelled occupation of Petitioner's property, which had existed for five years and ten days. App. 5a. After more than fifteen years of litigation, including two trials, the Federal Circuit rejected Petitioner's claims in light of its previous decision in *Cienega Gardens v. United States*, 503 F. 3d 1266 (Fed. Cir. 2007) (*Cienega X*).

### SUMMARY OF ARGUMENT

The petition raises important constitutional issues relating to the Takings Clause of the United States Constitution. The Court should grant certiorari to resolve important questions concerning the application of two takings tests—the *per se* takings standard of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and the *ad hoc* takings test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The decision below deepens the confusion over these tests and, in some respects, guts the protections they afford against government abuse.

*Loretto* establishes liability for compensation under the Takings Clause if a regulatory scheme compels a physical occupation of private property by third parties. The Court below found *Loretto* to be inapplicable to the facts of this case because the forced occupation did not continue indefinitely. However, nothing in *Loretto* holds that liability for a forced physical occupation can be evaded simply by terminating the taking.

The Court below acknowledges that the character of the regulations at issue – forcing Petitioner to bear the full costs of providing low-income housing – supports a finding of a taking. However, following its own erroneous precedent, the Federal Circuit ruled that the economic impact of ELIHPA and LIHPRHA must be evaluated relative to the value of Petitioner’s property over its entire life. Under that computation, neither this nor any other conceivable regulatory enactment could rise to the level of a taking, so long as the value of the property is not entirely destroyed.

## ARGUMENT

### I

#### **CERTIORARI SHOULD BE GRANTED TO RESOLVE QUESTIONS OF NATIONAL IMPORTANCE REGARDING THE SCOPE OF THIS COURT’S PHYSICAL TAKINGS DOCTRINE**

Because LIHPRHA forced Petitioner to suffer a physical occupation of its property by third parties, this case comes within this Court’s doctrine of *per se* physical takings. *See Loretto*, 458 U.S. 419. Yet, although the Federal Circuit recognized that

the forced occupation of Petitioner’s property had the “character” of a taking, it found this point to be “not dispositive” of the takings issue. App. 16a. This holding was presumably compelled by the court’s earlier erroneous ruling that LIHPRHA “merely . . . enhance[d] an existing tenant’s possessory interest.” *Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001) (*Cienega VI*).

The holding in *Cienega VI*, as applied to Petitioner’s physical taking claim by the court below, rests on two faulty premises. First, the Federal Circuit appears to assume that government- mandated physical occupations of limited duration—like LIHPRHA’s forced occupation of Petitioner’s property—are not “permanent” enough to qualify as *per se* takings under *Loretto*. Second, once a landowner chooses a specific use for his property, a *per se* physical taking supposedly cannot result from a forced extension of that use. See, e.g., *Cienega Gardens v. United States*, 33 Fed. Cl. 196 (1995).

Both these premises are inconsistent with the facts and reasoning of *Loretto* itself.

**A. This Court Should Clarify That a  
Forced Physical Occupation of  
Private Property That Is  
Subsequently Terminated  
Can Effect a *per Se* Taking  
for The Time of the Occupation**

In *Loretto*, a New York statute required landlords to permit cable companies to install facilities on their properties—not indefinitely, but

only “[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation.” *Loretto*, 458 U.S. at 439. The statute was challenged on the grounds that the forced acquiescence in the occupation of one’s property by third parties effected a taking, and this Court agreed. *Id.* at 421.

The Court observed that a temporary physical interference with property that falls short of an occupation, and regulations that merely restrict property use, are properly analyzed under the multi-factor balancing analysis of *Penn Central*. *Id.* at 430. However, when the character of the regulatory action “reaches the extreme form of a permanent physical occupation,” the *Penn Central* test can be dispensed with. *Id.* at 426. In such cases, the character of the government’s action becomes the determinative factor, giving rise to a compensable taking without regard to other considerations. *Id.*

This holding was based in part on prior decisions which recognized that even short-term physical occupations by government may constitute *per se* violations of the Takings Clause. *Id.* at 431. In *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951), the federal government “possessed and operated” the property of a coal mining company for five-and-a-half months in order to stave off a nationwide miners’ strike in wartime. *Id.* at 115. The Court unanimously concluded that the government’s seizure was a *per se* taking, with no regard to the occupation’s relatively limited duration. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121-22 (Burton, J., dissenting).

The limited duration of the government’s occupation of the property was considered relevant only to the amount of compensation due to the plaintiff. *Id.* at 117. The *Loretto* Court attached no significance to the fact that the *Pewee Coal* occupation was short-lived, focusing on the character—not the duration—of the government’s action. *Loretto*, 458 U.S. at 431 (because of the “actual taking of possession and control,’ the taking was as clear as if the Government held full title and ownership” (citing *Pewee Coal*, 341 U.S. at 116)).

Other wartime seizure cases are in accord with *Pewee Coal*’s principle: the forced physical occupation of private property constitutes a categorical taking, irrespective of the fact that the occupation is subsequently terminated. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (*per se* taking in government’s temporary use and occupancy of laundromat); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (*per se* taking in the government’s temporary occupation of a building through the ouster of existing tenants); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945) (*per se* taking in the government’s “temporary occupancy of a portion of a leased building” for one year). This Court has repeatedly reaffirmed the continued vitality of these seizure cases. *See, e.g., Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

Inexplicably, however, while expressly relying on the analysis of *Pewee Coal*, dictum in *Loretto* purported to distinguish a compensable “permanent

physical occupation” from a mere “temporary invasion,” which would be subject to *Penn Central*’s balancing test. *Loretto*, 458 U.S. at 428. In an especially enigmatic footnote, the Court noted:

The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking.... [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

*Id.* at 436 n.12.

“This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence.” Dennis H. Long, *Note, The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and An Opportunity for New Directions in Takings Law*, 72 Ind. L. J. 1185, 1194 (1997). If, as the *Loretto* dictum suggests, *Penn Central*’s test applies to all “temporary” government incursions, then *Loretto* must be interpreted to have overruled *sub silentio* the wartime seizure cases, including *Pewee Coal*. Yet this is impossible: *Loretto* unqualifiedly, expressly relies on *Pewee Coal*. *Loretto*, 458 U.S. at 431. A more plausible interpretation is that *Loretto* sought to relegate to *Penn Central* “a class of temporary takings claims in which the duration is less than some as yet

unspecified threshold”—presumably less than the five-and-a-half months spanning the *Pewee Coal* occupation. *See Long, supra*, at 1194. Petitioner’s claim arising from a five-year compelled physical occupation of its property is not in this class.

Courts have struggled to determine exactly which physical occupations are subject to *Loretto*, with conflicting results. In *Preseault v. United States*, 27 Fed. Cl. 69 (1992), plaintiffs owned land through which a railroad had for years owned an easement for its tracks. After the rail company abandoned the easement, plaintiffs expected the easement to revert back to them under state law. But under an intervening federal statute, the government authorized transfer of the easement as a hiking trail to a neighboring town for a maximum of thirty years. Plaintiffs challenged the government’s action as a *per se* taking. *Id.* at 75-81.

The Court of Federal Claims found that the government’s forced transfer of the easement to a third party effected a physical occupation, but only a temporary one, because of the thirty-year lease limit. *Id.* at 95. Consequently, the court analyzed the physical occupation under the *Penn Central* balancing test and held there was not a taking. But the Federal Circuit subsequently reversed, holding that it was error to interject the *Penn Central* analysis into what was clearly a “physical occupation case.” *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996).

In contrast to the trial court decision in *Preseault* stands *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). To combat ground water pollution, the federal government in *Hendler*

requested access to plaintiffs' property to install wells for monitoring and extracting waste migrating from a nearby site. Notwithstanding plaintiffs' refusal, government agents installed the wells anyway. *Id.* at 1369. Plaintiffs challenged the government's actions as effecting a taking. The Court of Federal Claims ruled in the government's favor, but the Federal Circuit reversed. *Id.* at 1367.

Consistent with the wartime seizure cases, the Federal Circuit held that the installation of wells on plaintiffs' property constituted a physical occupation, and thus a *per se* taking—regardless of the finite or even short-term duration of the occupation. *Id.* at 1378. Addressing the government's claim that the occupation was temporary, the Federal Circuit offered a different interpretation of “temporary” occupations than that of the Court of Federal Claims in *Preseault*:

“[P]ermanent” does not mean forever . . . . A taking can be for a limited term—what is “taken” is . . . an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. . . .

If the term “temporary” has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass.

*Id.* at 1376-77.

The present case squarely presents this unresolved question from *Loretto*, that has been a source of confusion and conflict among the lower courts. The most internally consistent interpretation of *Loretto* is that the dispositive factor in a physical occupation takings claim is the character of the regulatory action, *i.e.*, whether “the government exercises ‘complete dominion or control’ over the property interest affected.” M. Reed Hopper, *A Rationale for Partial Regulatory Takings: A Closer Look at Selected United States Supreme Court Precedent*, 31 Sw. U. L. Rev. 19, 21 (2001). Certiorari should be granted to clarify that the regulatory intrusion in this case—a five-year forced occupation of Petitioner’s property by third parties— rises to the level of a *per se* physical taking under *Loretto*.

**B. Certiorari Should Be Granted to Clarify That a Landowner’s Choice to Put Property to a Specific Use Does Not Bar a Subsequent Physical Takings Claim If the Government Compels the Continuation of That Use**

Both the Court of Federal Claims and the court below were constrained in their adjudication of Petitioner’s physical takings claim by the previous erroneous treatment of this issue by the Federal Circuit in *Cienega VI*, 265 F.3d at 1248-49. In that decision, the lower court held that ELIHPA and LIHPRHA did not give rise to a physical taking because the effect of the regulations “is merely to enhance an existing tenant’s possessory interest.”

*Id.* (citing *Yee v. City of Escondido*, 503 U.S. 519 (1992)).

While the court below was not free to repudiate this astonishing proposition, it is now squarely presented to this Court. In essence, the Federal Circuit ruled that because Petitioner and other investors accepted the government's inducements to enter the rental business in the first place, they somehow implicitly consented to the forced occupation of their property by low-income tenants twenty years later. This reasoning, incorporated in the present case, App. at 6a-7a, finds no basis in *Yee* or any other of this Court's precedents.

*Yee* involved a physical takings challenge to a mobile home rent control ordinance. Mobile home park owners claimed the ordinance, in conjunction with a state statute, effected a *per se* taking under *Loretto* by eliminating their right to choose incoming tenants, and to set the rent charged for the pad on which the mobile home sits. *Yee*, 503 U.S. at 526-27.

This Court upheld the ordinance, concluding it did not effect a physical taking. The Court noted that the "element of required acquiescence is at the heart of the concept of occupation," and that "[t]he government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Id.* at 527 (citation and quotation marks omitted).

In that case:

[N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.

To the contrary, [state law] provides that a park owner who wishes to change the use of his land may evict his tenants . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

*Id.* at 527-28.

Absent government compulsion, there could be no physical occupation under *Loretto*, and therefore no *per se* taking. The *Yee* Court made clear it did not address a case where “the statute, on its face or as applied, [compelled] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.” *Id.* at 528. Yet LIHPRHA did just that, compelling Petitioner over its objection to rent its property to low-income tenants for more than five years. Moreover, Petitioner had no reasonable means of converting its property to other uses, so its property was at the mercy of the government and its approved tenants. Consequently, the holding in *Yee* has no bearing on this case.

Certiorari should be granted to clarify that a landowner's choice to make a specific use of his property cannot bar all *per se* taking claims against subsequent compelled physical occupations consistent with that use.

## II

**THE HOLDING OF THE COURT BELOW,  
THAT THE ECONOMIC IMPACT OF  
LAND-USE REGULATIONS SHOULD BE**

**MEASURED AGAINST THE LIFETIME  
VALUE OF REAL PROPERTY, WOULD  
NULLIFY THE VERY CONCEPT OF  
TEMPORARY REGULATORY TAKINGS  
UNDER PENN CENTRAL**

Although Petitioner's takings claims should have been resolved in its favor under *Loretto's per se* rule, the impact of ELIHPA and LIHPRHA clearly give rise to takings liability under the multi-factor balancing test of *Penn Central*.

Under *Penn Central*, liability for just compensation under the Takings Clause depends on the offending regulation's economic impact on the property owner and the character of the government action. *Penn Central*, 438 U.S. at 124. As the court below recognized, the character of the government action in this case – the forced physical occupation of Petitioner's property for more than five years – clearly favors a taking. App. 15a-16a. Congress's abrogation of the prepayment option effectively authorized a continuing physical occupation of Petitioner's property against its will; moreover, Congress specifically did so to force a small number of property owners to bear the full costs of providing a general public benefit (affordable housing).

In a straightforward application of *Penn Central*, the Court of Federal Claims determined that Petitioner had suffered a severe economic impact from the application of ELIHPA and LIHPRHA to its property. App. at 137a. Nevertheless, the court below set aside this determination due to the egregious economic

blunder it had previously committed in *Cienega X*, holding that the economic impact prong of Penn Central must be evaluated by the regulation's reduction in the value of real property over its entire expected life, *i.e.*, to infinity. App. at 10a-12a. If allowed to stand, this outlandish rule would erase this Court's jurisprudence of temporary regulatory takings, render Penn Central a curiosity, and reduce the class of compensable takings to those that fit within the narrow categorical rules of *Loretto* or *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

In a gross misreading of this Court's decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Federal Circuit in *Cienega X* extended the analysis in that case to partial regulatory takings, stating "the necessity of considering of the overall [*e.g.*, lifetime] value of the property was explicitly confirmed in the temporary regulatory takings context." *Cinega X*, 503 F.3d at 1281 (citing *Tahoe-Sierra*, 535 U.S. at 331). Yet *Tahoe-Sierra*, a case in which the plaintiff property owners alleged a complete deprivation of economic value under *Lucas*, had no bearing whatsoever on temporary regulatory takings.

If liability for a Penn Central taking required a significant economic impact on the value of real property measured over its entire useful life, a reduction in the financial rate of return over the effective duration of a regulation could never effect a taking. Yet this Court has frequently noted that an inadequate return is part of a taking analysis in the context of regulated utilities and other

commercial enterprises. *See, e.g., Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). *Penn Central* itself absolved the local government of takings liability in part because of its evaluation that the plaintiffs' railroad terminal could "be regarded as capable of earning a reasonable return" on the owners' investment. *Penn Central*, 438 U.S. at 129, 136.

Certiorari should be granted in this case to explicate the relationship between *Penn Central* and *Tahoe-Sierra*, and to clarify that the economic impact prong of the former decision is unaffected by the analysis of *Lucas* claims set forth in the latter. Only this Court can clarify that when a physical invasion of land is countenanced by the government, the taking must be compensated, whether the *Loretto per se* physical takings test or *Penn Central ad hoc* takings test applies.

**CONCLUSION**

For these reasons, the Court should grant the petition for writ of certiorari.

Dated: June 11, 2012

R. S. RADFORD  
*Counsel of Record*  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747  
E-mail: [rsr@pacificlegal.org](mailto:rsr@pacificlegal.org)

*Counsel for Amicus Curiae*  
*Pacific Legal Foundation*