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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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> I could not tell you what the law is in the area right now. I just couldn't. I'm mystified, and I used to be an appellate lawyer….
>
> For heaven sake, when you get to *Cienega X* and you still don't know what you're supposed to do as a Trial Judge, that's a problem, and somebody needs to sort it out. It's beyond this Court's pay grade to do that.
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> --Hon. Charles F. Lettow, *Independence Park v. United States*, No. 94-10001C (Fed. Cl.), hearing on Oct. 25, 2007, Tr. 19-21 (discussing Federal Circuit precedent on regulatory takings).

Federal Circuit precedent on regulatory takings is confused and contradictory. The government effectively concedes the point. The government nowhere attempts to reconcile the conflicting panel decisions in *Cienega VIII*[1] and *Cienega X*.[2] Nor does the government dispute the conclusion of Professor Steven Eagle, author of the leading treatise, REGULATORY TAKINGS (3d ed. Lexis 2005), that "there is a tremendous need for clarification and predictability" in the law. *See* Brief *Amicus Curiae*

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1 *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

2 *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007).

of the National Federation of Independent Business Small Business Center, the Cato Institute, and the Center for Constitutional Jurisprudence at 5.

The government instead attempts to defend the decision below as "correct" and as "not conflict[ing] with any decision of this Court or any other court of appeals." *See* Br. for the United States in Opp'n ("Opposition" or "Opp.") at 12.

The government neglects to mention that the panel majority itself said otherwise. According to the panel majority, controlling Federal Circuit precedent (*i.e.*, *Cienega X*) "deviated" from longstanding precedent and "would virtually eliminate all regulatory takings." App. 12a. The panel majority confessed error but said that it had no choice but to follow the prior panel decision.

The Federal Circuit has created a mess. By the court's own admission, its panel decisions on regulatory takings are in direct conflict. App. 11a. But the Federal Circuit refuses to clean up the mess that it has created, denying *en banc* review here. App. 235a.

This Court should act. The Federal Circuit alone handles claims for compensation against the federal government. Confusion will continue to reign, and this Court's precedent will continue to be ignored, unless this Court grants review of the important constitutional and contractual issues presented here. No other property owner should suffer what the Norman Family has suffered: more than $700,000 in lost rental income during the period of the confiscatory regulation (a severe loss for a small apartment complex, concentrated over five years and representing an 81% deprivation in income) – followed by 15 years of litigation, two trials, two

judgments in its favor, two reversals, and the denial of *en banc* review (even though the court confessed error and admitted that its decision conflicted with Federal Circuit precedent and otherwise "deviated" from longstanding precedent).

This Court alone can restore the supremacy of its precedent and bring clarity to the law.

I. THE FEDERAL CIRCUIT HAS DECIDED IMPORTANT TAKINGS ISSUES IN CONFLICT WITH THIS COURT'S PRECEDENT AND OTHER FEDERAL CIRCUIT PRECEDENT

A. The Federal Circuit's Holding Conflicts With *Loretto* And *Kaiser Aetna*

The entire point of the "Preservation Statutes" was to "preserve" low-income, HUD housing, as the government admits. Opp. 2. The Preservation Statutes accomplished this goal by forcing owners such as the Norman Family, against their will, to house qualifying, HUD-approved tenants, for a period of 20 additional years.

This Court's precedent requires the payment of just compensation for such government-forced physical invasions. Pet. 20-24; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). But the Federal Circuit held otherwise in a four-sentence, summary disposition. *Cienega Gardens v. United States,* 265 F.3d 1237, 1248-49 (Fed. Cir. 2001) ("*Cienega VI*").

1. The Government's Arguments Lack Merit

The government opposes this Court's review on the ground that the Federal Circuit has correctly

applied this Court's precedent. The government's assertions have no merit.

First, the government asserts that any physical occupation does not require the payment of just compensation because the physical occupation here was "temporary." Opp. 15. This supposed distinction does not withstand scrutiny even if it were correct that a 20-year forced occupation, later cut short to a five-year forced occupation by new legislation, could be considered "temporary."[3] In the World War II cases, this Court repeatedly held that the government must provide just compensation for such temporary physical occupations. *United States v. Pewee Coal Co.,* 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

In the alternative, the government says that ELIHPA and LIHPRHA did not effect a physical invasion because the statutes "simply regulated [owners'] contractual options to prepay their mortgages" and did not "altogether eliminate" the right to exclude. Opp. 15-16. The government contends that the Preservation Statutes did not "altogether eliminate" the Norman Family's right to exclude because the Family helped to select the tenants, and "the individuals on petitioner's property [at the 20-year prepayment date] were already lessees." Opp. 16. According to the government, this case differs from *Yee v. City of Escondido*, 503 U.S.

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[3] The new HOPE legislation restored owners' prepayment rights. For the Norman Family, HOPE meant that the physical occupation ultimately lasted five years. App. 5a.

519 (1992), and *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987), because "[i]n both *Yee* and *Florida Power* [], 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.'" *Id.* (citation omitted).

These assertions misstate the Preservation Statutes and misapprehend their impact. The Norman Family invited HUD-approved tenants for 20 years, not 40. Regardless, LIHPRHA did not merely extend the tenancies of existing tenants by as many as 20 years. LIHPRHA also conscripted the Norman Family to house new, HUD-qualifying tenants. When one HUD-approved tenant left, the Norman Family had no choice but to rent the vacated unit to some new HUD-approved tenant. The Norman Family could not have let the complex go vacant over time. Such action would have defeated the entire purpose of the transaction between the Norman Family and HUD. This explains why Congress stated that it had "preserved" affordable housing.[4]

This case presents exactly the issue reserved in both *Yee* and *Florida Power*. The government forced the Norman Family, against its will, to refrain from prepaying and exiting the HUD program, and from terminating existing tenancies for a period of 20 years, and forced the Norman Family to house new

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[4] Even if the Norman Family could have let its apartment complex go vacant over time, it still could not have put the property to other uses. The property would have sat vacant and useless and generated no income. The right to exclude is meaningless if it is not accompanied by other property rights.

tenants when existing tenants vacated. The Norman Family could not use the property for any purpose other than HUD housing. The legislation compelled the Norman Family's acquiescence in a 20-year trespass. *See Cienega VIII,* 331 F.3d at 1328 (ELIHPA and LIHPRHA "intentionally defeated the Owners' real property rights to sole and exclusive possession after twenty years").

2. The Norman Family Pressed The Argument Below

The government also asserts that the Norman Family did not raise its physical takings argument before the Federal Circuit and therefore the physical takings issue is "unfit for this Court's review." Opp. 13.[5] The assertion is false. The Norman Family argued to the Federal Circuit that *Loretto* controlled and, *of itself*, compelled affirmance of the Court of Federal Claims' ("COFC") judgment finding a taking and awarding just compensation. The Norman Family's appellate brief recites:

> This physical occupation and abrogation of the right to exclude *singularly supports* the COFC's finding of a taking. In *Loretto …* the Supreme Court held that the government effected a taking by forcing a landlord to acquiesce in the installation of a small cable box in the apartment building. The law cannot be that a landlord compelled to accommodate one 30-foot cable and two small cable boxes has a compensable takings claim, but a landlord compelled to house hundreds of

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[5] The government acknowledges that CCA raised the physical takings argument before the COFC. Opp. 13, n.3.

low-income tenants for 20 years does not.

Principal and Response Brief of Plaintiff-Cross Appellant CCA Associates, Sept. 16, 2010, at 23 (emphasis added).

The brief goes on to argue that "this case presents exactly the 'different case' noted by the Supreme Court in *Yee*" because "[t]his was a *physical invasion*, and an abrogation of the right to exclude, the same as if Congress had enacted legislation directing landlords of existing conventional properties to henceforth lease units only to HUD-approved low-income tenants…." *Id.* at 27 (emphasis added). The brief concludes: "The Preservation Statues effected, at a minimum, a result comparable to a *physical invasion*…. Under these circumstances… the COFC's finding of a taking must be affirmed." *Id.* at 28.

The Norman Family advanced the exact arguments it raises here. The Federal Circuit, for whatever reason, decided not to address them.

The government's "waiver" argument amounts to nothing more than this: The Norman Family did not "press" its physical takings argument because it did not include a separate section in its appellate brief asking the Federal Circuit to reconsider *en banc* the prior decision in *Cienega VI*. Opp. 12-13. But the Norman Family's strategic decision to *defend* the judgment below by citing and explaining relevant Supreme Court precedent on physical takings (including *Loretto*), rather than by acknowledging defeat and asking the Federal Circuit to grant *en banc* review (a fool's errand as the history of this case proves), does not mean that the Norman Family failed to raise or "press" the argument below. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S.

118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile.").

B. The Federal Circuit Has Imposed Rigid, Inflexible Requirements For Establishing A Regulatory Taking, In Conflict With This Court's Precedent

The government does not dispute that this Court has "generally eschewed any 'set formula'" for determining a regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); Pet. 24-25. The test is *ad hoc*, and the question is whether the government has "forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The government cannot evade this long-settled rule so, not surprisingly, it argues that the decision below does not impose rigid requirements for establishing a regulatory taking. Opp. 17-21. But this rhetoric is belied by substance:

- The court *held* that the economic impact of ELIHPA and LIHPRHA must be determined in reference to the property's lifetime value. Pet. 15-16, 25-26; App. 10a-13a.
- The COFC found that "an 18% economic loss [in the lifetime value of real property] concentrated over approximately five years constitutes a 'serious financial loss.'" App. 138a (citation omitted). The Federal Circuit nonetheless *held* that an owner must satisfy

some undisclosed, threshold quantum of loss greater than 18% to support a taking, presumably on the order of 75%. Pet. 28-30; App. 10a (77% economic loss supports taking).

- The court *reaffirmed* its holding in *Cienega X* that statutory, offsetting benefits "must" be considered in determining economic impact, even where the owner never actually receives the benefits. App. 8a. The court's ruling means that the government can escape paying just compensation in every case by merely *offering* some compensation (even if the owner ultimately receives nothing). Pet. 31-33.
- The court *held* that an owner cannot establish reasonable, investment-backed expectations unless it proves that the owner's investment expectations matched those of the "industry." App. 13a-15a. The court therefore discounted – entirely – the COFC's factual findings that the Norman Family's investment-backed expectation to prepay the HUD-insured mortgage (i) was the *sine qua non* of the entire deal, *id.* at 116a, (ii) formed the *primary* investment-backed expectation for the Norman Family, *id.* at 115a-117a and (iii) would have formed the primary investment-backed expectation *for any reasonable investor*, given the complex's quality construction and location in an area of anticipated development, *id.* *See* Pet. 33-35.

The government disputes none of the above points. These rigid, check-the-box requirements cannot be reconciled with this Court's precedent. Pet. 25-35. They serve only to "virtually foreclose[]" and "virtually eliminate" regulatory takings claims.

App. 12a-13a.

C. Federal Circuit Precedent Is Internally Incoherent

In reversing the COFC's judgment of a taking, the panel refused to consider that ELIHPA and LIHPRHA had caused the Norman Family to suffer a more than 80% loss in income during the period of confiscation. Nor did the panel consider the minimal available annual return of just $12,952 (on a property worth several million dollars if unencumbered by HUD regulation). App. 10a-11a. Instead, the panel ruled that the Norman Family had not satisfied the "economic impact" prong of *Penn Central* because, applying the "parcel-as-a-whole rule" and considering only the diminution in the *lifetime value* of the property, the Norman Family had suffered a loss of 18%, which the court deemed insufficient to support a taking. App. 10a-13a.

The government defends this result – but without acknowledging what the panel majority actually said and without addressing the conflict in Federal Circuit precedent. Opp. 18-19. The panel majority, contrary to the impression that the government seeks to create, opposed application of the lifetime-value rule but considered itself bound to apply it, in light of the court's prior decision in *Cienega X*, 503 F.3d 1266. The panel majority explained that *Cienega X* not only ran afoul of longstanding precedent but, if not overruled, "would virtually eliminate all regulatory takings." App. 12a. The court reasoned: "If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to

severe economic deprivation when compared to our prior regulatory takings jurisprudence." *Id.*

The panel majority further explained that *Cienega X's* lifetime-value rule, in addition to "deviat[ing]" from settled law, directly conflicted with the panel decision in *Cienega VIII*, 331 F.3d 1319. "Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the economic analysis between the two cases." App. 11a.

The government glosses over these inconvenient points but suggests that this Court need not be concerned because, in dictum, the panel majority purported to limit *Cienega X's* lifetime-value methodology "to the ELIHPA and LIHPRHA cases." Opp. 17.

There is no reason to think that the dictum of these two judges will be followed. The specially convened *seven-judge* panel in *Cienega X held*, purportedly by applying Supreme Court precedent, that the economic impact in regulatory takings cases may be determined *only* in reference to the property's lifetime value and affirmatively *rejected* alternative methodologies. 503 F.3d at 1280-82. The panel majority had no authority to limit this holding by a prior panel.

There particularly is no reason to think that the dictum will be followed because, as evidenced here, the government intends to argue that the seven-judge panel in *Cienega X* properly applied Supreme Court precedent. The government obviously does not view the dictum of the panel majority as any obstacle. Opp. 18-19.

Regardless, there is no principled reason why the Norman Family and the 68 other owners still pursuing LIHPRHA-related takings claims[6] should suffer the consequences of the Federal Circuit's confessed errors and its refusal to correct those mistakes *en banc*. This Court should clean up the mess, clarify the law, restore the supremacy of its precedent, and do justice.

II. THE GOVERNMENT ADMITS THAT THE FEDERAL CIRCUIT'S CONTRACT HOLDING CONFLICTS WITH A DECISION OF THE TENTH CIRCUIT

The government admits that there is a circuit split with respect to the Federal Circuit's contract holding. Opp. 23 (Federal Circuit precedent conflicts with the Tenth Circuit's decision in *Aspenwood Investment Company v. Martinez*, 355 F.3d 1256 (10th Cir. 2004)). The government nonetheless claims that review should be denied because the circuit split "is of no significant prospective importance" and because "petitioner's complaint reduces to the proposition that the Federal Circuit erroneously applied a correctly stated rule of law…." *Id.*

In fact, the Federal Circuit never stated the correct rule of law. *See Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*"). The relevant question concerns contract

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6 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 at 1 (remaining LIHPRHA litigations concern 68 plaintiffs and 95 properties).

formation, not interpretation: Did the parties intend the transaction documents to constitute one overarching agreement? The Federal Circuit bungled this question, as pointed out by Judge Archer in dissent in *Cienega IV*, 194 F.3d at 1247, the Tenth Circuit in *Aspenwood*, 355 F.3d at 1260, the COFC, App.67a-86a, and even the panel majority here. (The panel majority described the COFC's criticism of the controlling Federal Circuit precedent as "exceedingly thoughtful and thorough." App. 17a.)

The Federal Circuit's contract holding is yet another mess that the court refuses to clean up *en banc*. The issue has import. The Federal Circuit has jurisdiction over all claims for contract damages against the federal government, and its precedent on contract formation fails to reflect settled, black-letter law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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