Docket No. 16-56255

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLONY COVE PROPERTIES, LLC
Plaintiff and Appellee,

vs.

CITY OF CARSON and CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD,
Defendants and Appellants.

Appeal from the United States District Court
for the Central District of California
Case No. CV14-03242 PSG (PJWx)

APPELLANTS' OPENING BRIEF

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PRELIMINARY STATEMENT

In April 2006, Plaintiff Colony Cove Properties, LLC made a highly leveraged purchase of a rent-controlled, senior-citizen mobilehome park, Colony Cove Mobile Estates, with $5 million down and $18 million in financing. Plaintiff wagered that it could obtain a rent increase to force the residents of the park to bear the cost of Plaintiff's enormous debt service—some $1.2 million per year. When Defendant City of Carson refused to allow that, Plaintiff turned to the Fifth Amendment's Takings Clause to conscript the City's taxpayers as insurers of Plaintiff's investment.

Plaintiff knew exactly what it was getting into. Plaintiff's principal, James Goldstein, has owned a mobilehome park across the street from Colony Cove since 1983. Goldstein is intimately familiar with the City's rent control regulations. He knew that any rent increase application would be subjected to multiple econometric analyses by the City's independent Mobilehome Park Rental Review Board ("Board") and that the City's ordinance does not guarantee any particular increase. Indeed, he has frequently sued the City, unsuccessfully, over that ordinance. At trial, Plaintiff's own appraisal of the park showed that the $23 million purchase price was not supported by the park's existing rental revenue and thus that price made no sense unless Plaintiff could obtain a massive rent increase. Plaintiff also received a clear written warning from Goldstein's longtime legal counsel that "a purchaser should not rely on collecting any increased rents from those collected currently." Nevertheless, Plain-

tiff made the purchase and committed to annual interest payments of almost twice the park's existing net income.

Plaintiff immediately applied to the City for a rent increase of $618 per month (later reduced to $200) for mobilehome spaces that rented for an average of only $414 per month. Even the lower $200 request was of an unprecedented scale: it was more than *twice as large* as the largest increase granted by the Board in the 20-year history of rent control in the City. (The previous record increase had itself been unusual because the park owner had not requested an increase in over a decade.)

The Board conducted extensive hearings on the application, evaluated expert testimony applying competing valuation methodologies, and granted an increase of about $36 per space per month, followed by an additional $25 the following year. With those increases, the park remained the second most expensive mobilehome park in the City and the Park's annual gross income increased by $177,675 and $120,967, respectively. The City then approved several major applications that Plaintiff submitted to ensure the park would be a risk-free investment: conversion of the park to condominiums, a generous capital rent increase for improvements made by the prior owner of the park, and approval of 16 new mobilehome park spaces that would be exempt from rent control. All of these approvals would make the park more profitable. However, because of the payments needed to service Plaintiff's substantial debt, Plaintiff experienced

temporary operating losses for the first couple of years after purchasing the park, even with the added rent approved by the Board.

In granting the increases, the Board used a Maintenance of Net Operating Income ("MNOI") methodology in which debt service is not considered to calculate allowable rents. The use of MNOI has always been allowed under the City's ordinance and is widely recognized by California courts as affording property owners a constitutional fair return on investment while protecting park residents from excessive rent increases. *See Colony Cove Props., LLC v. City of Carson*, 220 Cal. App. 4th 840, 869-70 (2013). MNOI also prevents park owners from using debt service to make an end-run around rent control. In fact, since filing suit, Plaintiff refinanced the park, reducing its debt service substantially. If the Board had approved Plaintiff's requested increase, the park residents would still be paying for Plaintiff's debt long after it was retired. MNOI prevents that windfall.

In 2008, dissatisfied with the rent increases granted by the Board, Plaintiff, true to form, sued the City in federal court. The district court dismissed Plaintiff's claims, and this Court affirmed. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948 (9th Cir. 2011) ("*Colony Cove I*"). Plaintiff then sued in state court. The California courts rejected Plaintiff's claims on the merits. In a published opinion, the court of appeal confirmed that the Board's rent increases assured Plaintiff a constitutional fair return despite the brief period of negative cash flows.

Now back in federal court, Plaintiff claims that the Board caused a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), by applying the MNOI methodology and declining to shift Plaintiff's enormous interest expense to the park residents. Plaintiff's claim flouts this Court's consistent rejection of takings claims aimed at mobilehome rent control. This case is, in this Court's words, "deja vu all over again"—all over yet again. *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1086 (9th Cir. 2015) (quoting *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1122 (9th Cir. 2013)).

A twist in this case is that the district court asked a *jury* to apply the multi-factor *Penn Central* takings analysis. The jury was woefully unprepared for that task and rendered a verdict for Plaintiff of $3,336,056. With additional awards of prejudgment interest and attorneys' fees, Plaintiff's wager cost the City's taxpayers just shy of $7.5 million.

As in *MHC Financing*, this Court is called on to correct an erroneous application of the three-factor test set out in *Penn Central*. None of those factors support a taking here, as a matter of law. Plaintiff failed to demonstrate that the Board's decisions had a severe economic impact on Plaintiff's property: two years of negative cash flows do not amount to a taking on any recognized theory. In fact, Goldstein admitted that the Board's decisions *increased* the market value of the park. Further, Plaintiff's claimed "reasonable investment-backed expectation" of a rent increase two times larger

than any ever granted was nothing more than a gamble. Plaintiff was fully aware, or should have been, that it was not entitled to any increase, let alone one of that unprecedented enormity. Plaintiff therefore tried to persuade the jury that the City had "changed the rules" after Plaintiff purchased the park by amending the nonbinding guidelines for application of the rent control ordinance—an argument that squarely contradicted this Court's holding in *Colony Cove I*. Finally, the district court itself concluded that the "character of the governmental action," *Penn Central*'s final factor, weighed in the City's favor.

But the *Penn Central* test should never have gone to the jury in the first place: as this Court had implicitly recognized, application of *Penn Central* is a question of *law* based on facts. The district court compounded that error by providing perfunctory instructions that gave the jury no inkling of how to apply the test. The jury was thus left to decide for itself how to apply a legal standard that the Supreme Court has aptly called "vexing."

The district court's management of the trial only made matters worse. Incredibly, the court allowed Plaintiff to contradict this Court's plain holding in *Colony Cove I* by continuing to assert that the City had "changed the rules." Plaintiff was also allowed to introduce, as evidence, judicial opinions from unrelated cases and then argue about their legal significance to the jury. Plaintiff took advantage of these errors to paint the City—incorrectly, irrelevantly,

and prejudicially—as flagrantly violating the law and acting in bad faith.

Finally, when Plaintiff went to state court, it decided to hold back the *Penn Central* theory it asserts here. It thus failed to ripen its federal takings claim as this Court demanded in *Colony Cove I*.

In sum, due to a host of errors in the court below, an unprepared jury reached a mistaken legal conclusion based on a pervasively flawed record. This Court should therefore reverse the judgment on the merits or vacate the judgment and remand for dismissal on ripeness grounds. Short of that, the City is at least entitled to a new trial. If not corrected by this Court, the verdict will become a roadmap to circumvent constitutional rent control.

JURISDICTIONAL STATEMENT

Plaintiff filed this action under 28 U.S.C. § 1331 because the complaint alleged violations of the United States Constitution. Excerpts of Record ("ER") 3:386-420.[1] After a jury trial, the district court initially entered judgment for Plaintiff on May 16, 2016. ER 2:35-37. On June 13, 2016, Defendants and Appellants City of Carson and City of Carson Mobilehome Park Rental Review Board (collectively "City") timely filed a motion under Fed. R. Civ. P. 50(b). ER 2:89-90. The district court denied that motion on August 8, 2016, ER 1:30, and then entered an Amended Judgment Nunc Pro Tunc on August 25, 2016, ER 1:1-3.

[1] Citations to Appellants' Excerpts of Record are formatted as "ER [Volume No.]:[Page Nos.:Line Nos.]."

The City filed a notice of appeal on August 30, 2016, ER 2:75-79, less than 30 days after denial of the City's Rule 50(b) motion. *See* Fed. R. App. P. 4(a)(4)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in entering judgment for Plaintiff given that Plaintiff failed as a matter of law to show a taking under *Penn Central* because

A. Plaintiff put on no evidence to show a severe economic impact of the City's rent increase decisions on Plaintiff's property as a whole, but rather showed at most two years of negative cash flows;

B. Plaintiff acquired the park with knowledge that the City's rent control ordinance would allow the Board to grant a rent increase of less than Plaintiff's requested increase of unprecedented proportions; and

C. The district court had concluded as a matter of law that the "character of the governmental action" undermined Plaintiff's claim?

2. Did the district court err in asking the jury to construe and apply *Penn Central*'s multi-factor *legal* standard for a regulatory taking and the legal determinations required by each factor?

3. Assuming it was proper for the jury to apply *Penn Central*, did the district court err in failing to instruct the jury about the

application of that legal standard and instead merely quoting the three factors of that test?

4. Did the district court err in failing to give binding effect to this Court's holding in *Colony Cove I*, that the Board was not obligated to apply the GPM methodology and that the City did not "change the rules" applicable to rent control decisions after Plaintiff purchased its mobile home park in 2006?

5. Did the district court err in allowing Plaintiff to introduce as evidence state court decisions from unrelated cases and argue to the jury extensively about their legal significance?

6. Did the district court err in allowing Plaintiff to adduce evidence and argue that the City violated the law and acted in bad faith, given that such considerations are irrelevant to a Fifth Amendment takings claim after *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005)?

7. Did the district court's admitted error in sternly rebuking the City's counsel, before the jury, for violating an in-limine order unfairly prejudice the City?

8. Given Plaintiff's failure to present a *Penn Central* claim to the California courts under California law, is that claim unripe for review under *Colony Cove I*?

9. Assuming the jury was correct in finding liability, did the district court err in awarding attorneys' fees incurred in Plaintiff's state court litigation?

STATEMENT OF FACTS

I. The City's long history of regulating mobile home rents

There are 21 mobilehome parks in the City. ER 5:755:4-6. "The term 'mobile home' is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself." *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1009-10 (2001). "Because the owner of the mobile home cannot readily move it to get a lower rent, the owner of the land has the owner of the mobile home over a barrel." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1114 (9th Cir. 2010) (en banc). Recognizing this inherently unequal and coercive relationship, both the federal and California courts have uniformly upheld mobilehome rent control ordinances as constitutional, including Carson's ordinance specifically. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992); *Colony Cove I*, 640 F.3d at 948; *Guggenheim*, 638 F.3d at 1114; *Carson Harbor Vill., Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994); *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal. 3d 184 (1983).

In 1979, the City adopted a Mobile Home Space Rent Control Ordinance (the "Ordinance"). ER 5:741:18-23; ER 5:595-600. The Board is the body created to administer the Ordinance and decide park owners' applications for rent increases. ER 5:739:24-740:2. A park owner must apply to the Board to increase rents at any mobilehome park in the City. ER 5:749:17-24.

The City Council has adopted nonbinding "Guidelines for Implementation of the Mobile Home Space Rent Control Ordinance" (the "Guidelines"). ER 5:741:21-23; ER 4:579-94. They are intended only "to assist" the Board in implementing the Ordinance; "the provisions of the Ordinance are controlling." ER 4:581.

The Ordinance authorizes the Board to "grant such increases as it determines to be fair, just and reasonable." ER 4:597 (§ 4704(g)). It does not require the use of any particular formula for calculating allowable increases. ER 5:742:2-5, 746:18-23. Rather, the Board must weigh 11 factors set forth in the Ordinance, as well as other factors the Board deems relevant, including mortgage debt. 5:744:24-745:5; ER 4:597-98 (§ 4704(g)). The Ordinance expressly states that "no one (1) factor shall be determinative." *Id*.

When Plaintiff purchased the park in April 2006, the Guidelines provided that

> the Board may consider, in addition to the factors specified in § 4704(g) of the Ordinance, a 'gross profits maintenance analysis,' which compares the gross profit level expected from the last rent increase granted to the park prior to the current application ('target profit') to the gross profit shown by the current application.

ER 4:585 (§ II(B)). The GPM methodology incorporates mortgage expenses. ER 6:797:19-798:11. It is "an aid to assist the Board in applying the factors in the Ordinance," but is "not intended to create any entitlement to any particular rent increase." ER 4:585 (§ II(B)).

In October 2006, the City amended the Guidelines to clarify that that the Board

> may *also* consider, a 'maintenance of net operating income analysis,' which compares the net operating income (NOI) level expected from the last rent increase granted to a park owner and prior to any pending rent increase application (the so-called 'target NOI') to the NOI demonstrated in any pending rent increase application.

ER 4:601-02 (§ II(C)) (emphasis added). The MNOI methodology does not incorporate mortgage interest expenses. ER 6:798:17-799:11. The Board had previously applied the MNOI methodology, so the 2006 Guidelines amendment merely clarified that such practice was allowed. ER 5:747:2-6. The 2006 amendment expressly cautions that, like GPM, the MNOI calculation "is another aid to assist the Board" and "is not intended to create any entitlement to any particular rent increase." ER 4:602 (§ II(C)(2)). Therefore, when reviewing a rent increase application, Board staff uses several methodologies to calculate several potential rent increases for consideration by the Board. ER 5:744:22-747:6; ER 4:585 (§ II(B)); ER 4:597-98 (§ 4704(g)); ER 4:601-02 (§ II(C)).

II. Plaintiff's decades-long experience with rent control in the City before purchasing Colony Cove

Plaintiff's principal, James Goldstein,[2] has a history with rent control in the City that stretches back decades. Goldstein bought his first Carson mobilehome park, Carson Harbor Village ("CHV"), in 1983. ER 4:566.

[2] Goldstein controls Plaintiff, which owns Colony Cove, and thus he is Colony Cove's "owner." ER 5:738:14-23.

Like his later purchase of Colony Cove, Goldstein's purchase of CHV was leveraged. ER 5:738:14-739:9; ER 5:674:18-675:6; ER 4:616. Shortly after purchasing CHV, he applied to the Board for his first rent increase—requesting $57.85 more per space per month. ER 5:756:17-758:11; ER 4:616. Over 70 percent ($41.38) of that request was based on the debt service from the new purchase mortgage. *Id.* At the Board's hearing on the application, the City Attorney explained that debt service need not be passed through because "[p]resumably the owner would not pay more for the park than the income the park would generate," and because of the potential for debt service to be manipulated to drive up rents. ER 4:620-21. The Board then granted a $12 increase, excluding virtually all of the increased debt service. ER 5:756:17-758:11.

In the 17 rent increase applications for CHV thereafter and before Goldstein purchased Colony Cove, the largest rent increase he ever received was $58.70, and the remaining 16 increases ranged from $0 (seven times) to approximately $35. Goldstein sued the City over approximately 75% of the rent increase applications he submitted. ER 6:786:25-787:8.[3] The courts have upheld the City's rent increases (or denial of increases) and application of its Ordinance. *See, e.g., Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004); *Carson Harbor Vill*, 37 F.3d at 468; *Carson Harbor Vill.,*

[3] These CHV rent increases (other than the first $12 increase) were not admitted at trial because the district court erroneously prevented the City's counsel from eliciting testimony about them. *See infra* Argument Section III.D.

Ltd. v. Carson Mobilehome Park Rental Review Bd., 70 Cal. App. 4th 281 (1999).

III. Use of MNOI by the City prior to Plaintiff's purchase of the park

In May 2004, two years before Plaintiff purchased the park, Paradise Trailer Park (another park in the City not owned by Plaintiff) submitted its first rent increase application after changing ownership. ER 5:760:1-761:5; ER 4:569-70. The Board granted a rent increase using MNOI and excluded the debt service payments on the new owner's purchase mortgage. *Id.; see also,* ER 5:762:1-764:17; ER 4:622-27; ER 4:628-30; ER 4:634 (other examples of Board considering MNOI two years prior to Plaintiff's purchase).

IV. Plaintiff purchases the Park

On April 4, 2006, Plaintiff purchased Colony Cove Mobile Estates, a rent-controlled, senior-citizen-occupied mobilehome park. ER 5:669:10-20; ER 5:729:6-8; ER 5:738:18-21. Plaintiff purchased the park from Colony Cove Associates, which had owned the park since the 1970s. ER 5:740:5-7. Plaintiff paid $23,050,000 for the park, putting down $5,050,000 and financing the remainder with an $18,000,000 loan. ER 5:741:1-11. This loan required annual debt service payments of $1,224,681. ER 5:722:7-19. That debt service expense greatly exceeded the prior owner's *total annual profit* of $718,240. ER 4:461.

Nearly a year after purchasing the park and just before submitting its Year 1 rent increase application, Plaintiff obtained an

appraisal to "support" the $23,050,000 purchase price. ER 4:429-458. The appraisal concludes the park was worth the price only if it had potential for a "high degree of income growth" and if the Board "will allow some, if not all, of the increased property taxes and mortgage interest . . . to be passed through to the residents, increasing the rent levels at the [park] in the near term." ER 4:453.

However, before Plaintiff purchased the park, Goldstein's long-time legal counsel with decades of experience in the Board's application of the Ordinance gave Plaintiff a clear written warning that rent increases in the City could be "difficult or impossible to obtain in the near future" and that "*In our opinion, a purchaser should not rely on collecting any increased rents from those collected currently*." ER 4:428 (emphasis added).

Upon purchasing the park and in addition to the rent increase application at issue here, Plaintiff filed the following with the City:

1. An application to add 21 new, *non-rent-controlled* spaces to the park. The City approved construction of these new spaces, but five could not be developed because of proximity to oil wells. ER 5:713:9-714:6.
2. An application to convert the park from rental to condominium spaces, which would entirely eliminate City rent control in the park upon the sale of the first condominium space. *See Colony Cove I,* 640 F.3d at 959. The City granted the application. ER 5:711:12-713:8.

3. An application for a rent increase to pass through $266,000 in capital improvement expenses. The Board granted this increase. ER 5:751:12-24.

V. The Board approves a $36 rent increase in Year 1 and a $25 rent increase in Year 2, but declines to allow Plaintiff to pass the cost of its leverage through to the park residents

Plaintiff submitted its first rent increase application on or about September 28, 2007 ("Year 1" application), seeking an increase of $618 per space per month, which Plaintiff later reduced to $200. ER 5:690:5-691:18; ER 5:742:22-24, 5:750:9-15; ER 4:459; ER 2:107-124. All of the $200 requested increase was based on the more than $1.2 million in interest expense Plaintiff incurred in purchasing the park. ER 4:527; ER 2:107-124; ER 5:689:19-690:19; ER 5:750:9-25. Plaintiff submitted its second rent increase application on or about September 28, 2008 ("Year 2" application), seeking an increase of $342.46 per space per month. ER 5:742:25-743:2; ER 4:484; ER 2:107-124. When Plaintiff submitted the Year 1 application, rents in the park averaged $414.25 per space per month. ER 4:506; ER 2:107-124. Plaintiff's requested $200 increase therefore would have increased existing rents by about 50%. Plaintiff's $200 request dwarfed any increase awarded by the Board in the Ordinance's 27-year history (to say nothing of Plaintiff's mammoth initial $618 request):

1. It was *twice* as large as the largest rent increase ever granted by the Board. And that $100 increase was itself an outlier: the City had granted it only because that

owner had not applied to the City for a rent increase in over a decade. ER 5:754:7-18.

2. Plaintiff's request was approximately 45 times and 14 times larger, respectively, than the last two rent increases (of $4.46 and $14.50) granted at Colony Cove prior to Plaintiff's purchase. ER 6:784:11-785:12; ER 4:578; ER 2:20
3. It was approximately 17 times larger than the rent increase Goldstein received right after purchasing CHV, in which the Board excluded nearly all of his mortgage interest expense. ER 5:756:17-758:11; ER 4:566-67; ER 2:107-124
4. And finally, it was approximately 3.4 times larger than the largest rent increase ($58.70) Goldstein ever received for CHV out of his 17 rent increase applications prior to purchasing Colony Cove.[4]

Plaintiff demanded that the Board apply the GPM methodology to allow it to pass through its full interest expense to the park residents. ER 5:680:16-690:10. Dr. Kenneth Baar, Ph.D., an independent rent control expert explained at the Board hearing that "debt service arrangements may be manipulated for the purpose of obtaining larger rent increases," for example, by "refinanc[ing] at a lower interest

[4] The district court erroneously forbade testimony on these historical CHV increases (other than the first $12 increase). *See infra* Argument Section III.D.

rate or pay[ing] off [a] loan after the rent increase is granted." ER 4:556. "The rationale for an MNOI approach is that regulated owners are permitted an equal rate of growth in [net operating income] regardless of their particular purchase and financing arrangements. Therefore, rents are regulated depending on increases in expenses and the inflation rate ([CPI])." ER 4:557. Dr. Baar also explained the MNOI standard has been approved by the California appellate courts. ER 4:557-559 (citing four published cases).

The Board determined to apply the MNOI methodology. ER 5:692:16-693:3; ER 6:797:3-802:8; ER 6:803:18-812:10. The Board thus granted a $36.74 increase per space per month for the Year 1 application, an increase of 8.8%, and a $25.02 increase per space per month for Plaintiff's Year 2 application, an increase of 5.5%, resulting in increased annual gross income of $177,675 and $120,966.72, respectively. ER 5:723:17-724:15; ER 5:727:4-20; ER 4:539; ER 4:551.

VI. The park's significant profitability after July 2009

In 2011, within two years after the Year 2 decision, Plaintiff refinanced the mortgage for Colony Cove to lower the interest rate. In part due to the refinancing, since the Year 1 and Year 2 decisions, the park's income has significantly increased each year. In Plaintiff's fifth through eighth years of ownership, the park earned annual profits of $451,440, $624,829, $695,863, and $806,321.

In other words, the burden of the $1.2 million interest payments for the initial mortgage, on which Plaintiff had based its rent increase applications, was merely temporary. If the Board had

granted Plaintiff's requested increase, Plaintiff would have reaped a windfall profit after refinancing the mortgage. The jury never learned any of this, however, because the district court erroneously excluded all evidence of the park's value, revenue, or financial changes after July 2009, including Plaintiff's mortgage refinancing and subsequent profits. ER 3:271-79; ER 1:34; *see infra* Argument Section I.A.

STATEMENT OF THE CASE

I. In 2008, Plaintiff files its first suit in district court, and this Court holds that its takings claim is unripe and that the Board's use of MNOI was proper

On October 27, 2008, Plaintiff filed suit in district court for the first time. *See Colony Cove I,* 640 F.3d at 953. It asserted facial and as-applied challenges to the Year 1 decision on takings, due process, and other grounds. *Id.* at 953-54. It argued principally that the City had "changed the rules" governing rent increase applications when it amended the Guidelines in 2006. *Id.* In its as-applied challenge, Plaintiff contended that the Board's decision not to allow Plaintiff to pass through its debt service to the park residents effected a taking of Plaintiff's property. *Id.* at 954. The district court dismissed Plaintiff's claims as untimely, unripe, and unmeritorious. *Id.*

This Court affirmed. Relevant to this case, the Court held that "the 2006 Amendment did not alter the 1979 Ordinance itself" and thus "the 2006 Amendment to the Guidelines cannot be reasonably read as a substantive amendment of the 1979 Ordinance that alters its effect on mobilehome park owners." *Id.* at 957. The Court also af-

firmed dismissal of the as-applied takings claim as unripe, based on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which requires a federal takings claimant to first seek, and be denied, just compensation under state law. *See* 640 F.3d at 957-59; *see also infra* Argument Section IV. The Court also held that the Board's decisions were not arbitrary or irrational because neither the "Ordinance [n]or the Guidelines require the Board to employ any particular methodology in conducting its review of rental increase applications." 640 F.3d at 960-62.

II. Plaintiff sues in state court, and the state courts rule that the approved rent increases afforded Plaintiff a fair return

Plaintiff filed two writ of mandamus actions in California superior court seeking to overturn the Years 1 and 2 decisions. *See Colony Cove Props.*, 220 Cal. App. 4th at 847. In both cases, Plaintiff contended that the Board's use of MNOI was unfair and prevented Plaintiff from earning a fair return on its investment in the park. *Id.* Despite this Court's direction to seek just compensation in state court before returning to federal court on the as-applied takings claim reasserted here, Plaintiff's state court complaints did not allege a taking of its property under the California case law applying *Penn Central*. *Id.* at 863, 865-66; ER 3:302, 307.

The superior court denied Plaintiff's challenge on the merits. 220 Cal. App. 4th at 864. The court concluded that the rent increases in 2007 and 2008 provided Plaintiff a fair return though the City had

not allowed Plaintiff to pass through the cost of its debt service. The court held that the Ordinance and Guidelines always permitted the Board to use "any fairly constructed formula" for considering rent increase applications, including the MNOI calculation which ignores purchase debt. *Id.* at 864.

The court of appeal affirmed, concluding that the rent increases afforded Plaintiff a fair return. *Id.* at 866-73. The court held that the MNOI methodology "has been approved by multiple courts" and "[i]ndeed, the MNOI standard has been *praised* by courts and commentators for its 'fairness and ease of administration.'" *Id.* at 869 (emphasis added) (quoting *Palomar Mobilehome Park Ass'n v. Mobile Home Rent Review Bd.*, 16 Cal. App. 4th 481, 486 (1993)). The court emphasized "the inequities that would result from permitting a party that financed its purchase of rent-controlled property to obtain higher rents than a party that paid all cash." *Id.* at 871. Plaintiff filed an unsuccessful petition for review in the California Supreme Court. ER 3:366, ¶ 54.

III. Plaintiff returns to federal court and the court narrows Plaintiff's claims to a single, as-applied Fifth Amendment takings claim under *Penn Central*

Plaintiff returned to federal court on April 28, 2014, alleging a Fifth Amendment regulatory taking under several theories and a substantive due process claim. ER 3:386-420. The City filed two motions to dismiss, both of which the district court partially granted, narrowing Plaintiff's claims to a single as-applied *Penn Central* claim challenging the Years 1 and 2 rent increases. ER 1:44-74.

The court rejected the City's contention that the *Penn Central* claim failed as a matter of law. ER 1:70; ER 1:55. Although the court concluded that Plaintiff's claimed losses in rental income did not show a sufficient "diminution in value, on its own, [to] support a *Penn Central* finding," ER 1:68, the Court found a factual dispute about whether Plaintiff formed a reasonable investment-backed expectation of a rent increase based on the Board's past conduct, ER 1:70; ER 1:53-54. On the third *Penn Central* factor—the character of the governmental action—the Court agreed *twice* that this factor weighed in the City's favor as a matter of law under this Court's decision in *MHC Financing*. ER 1:70; ER 1:54-55.

IV. Plaintiff's *Penn Central* claim goes to trial

Both sides requested a jury trial. ER 3:374. The City acknowledged the Supreme Court's holding in *City of Monterey v. Del Monte Dunes at Monterey Ltd.,* 526 U.S. 687 (1999), that the Seventh Amendment guarantees a right to a jury trial in 42 U.S.C. § 1983 cases. ER 3:252; *see infra* Argument Section II.A. However, the City strenuously argued that *Del Monte Dunes* did not involve a *Penn Central* claim, that only disputed questions of fact could be presented to the jury, and that the bulk of the *Penn Central* test required the application of law to facts. ER 3:253-54; *see also* ER 2:244-50; ER 2:203-18; ER 2:173-89; ER 1:40:25-43:15; ER 2:147-48, 149-66. Nevertheless, and despite having concluded on motions to dismiss that two of the *Penn Central* factors did not support a taking as a matter

of law, the district court concluded that the entire case should be given to the jury to decide. ER 1:40:25-43:13.

Pertinent to this appeal, the district court made the following rulings on motions in limine ("MILs") adverse to the City:

1. Denied the City's MIL No. 1, which permitted Plaintiff to erroneously argue that the 2006 Amendment to the Guidelines "changed the rules" for rent increase applications even though this Court debunked that theory in *Colony Cove I* (ER 3:284-293; ER 1:36);
2. Denied the City's MIL No. 2, which allowed Plaintiff to introduce unrelated California court opinions as evidence and argue their legal significance to the jury (ER 3:263-70; ER 1:37);
3. Granted Plaintiff's MIL Nos. 4 and 5, which precluded the City from introducing any evidence of the park's value or refinancing after 2009 (ER 3:271-79; ER1:34); and
4. Granted Plaintiff's MIL No. 6, which precluded the City from discussing the California court of appeal opinion in *Colony Cove Properties* which was critical to rebut Plaintiff's reliance on unrelated cases (ER 3:314-16; ER 3:280-83; ER 1:35; ER 1:32).

The trial began on April 28, 2016 and was completed on May 5. ER 1:2:1-7. Prejudicial evidentiary errors permeated the trial, largely stemming from the in-limine rulings mentioned above. In addition,

the court censured the City's counsel in front of the jury based on the court's mistaken impression that she was violating one of the in-limine rulings. *See infra* Argument Section III.D.

The jury returned a verdict for Plaintiff on a verdict form. ER 2:104-06. The jury concluded that both the Year 1 and Year 2 rent increase decisions effected takings and concluded that Plaintiff was entitled to $3,336,056 in just compensation. ER 2:105-06.

On May 3, the City filed a motion for judgment as a matter of law under Rule 50(a). ER 2:129. The court reserved decision on the motion, ER 6:838:8-13, and the City renewed it after the jury returned its verdict, ER 2:89-90, 84-85. The court denied the motion without explanation. ER 1:17.

The district court entered judgment on May 16, 2016. ER 2:96-98. The judgment recited that the Board's decisions had effected takings and provided that Plaintiff recover $3,336,056. *Id.* The judgment was silent about prejudgment interest. *Id.* The parties filed competing motions about prejudgment interest, ER 2:91-93; ER 2:86-88, and Plaintiffs filed a motion for attorneys' fees and costs, ER 2:94-95. Despite the jury's finding that Plaintiff was not entitled to prejudgment interest, the district court erroneously awarded interest at a rate of 4.5 percent, which amounted to $1,119,543.83. ER 2:80-83; ER 1:3. The court also awarded Plaintiff $2,910,299.62 in attorneys' fees and $98,818.96 in costs. ER 1:16. This award included fees incurred in Plaintiff's *unsuccessful* litigation in state court. ER 1:7. In total, the court awarded Plaintiff $7,464,718.41.

The court entered an Amended Judgment Nunc Pro Tunc on August 25, 2016, ER 1:1-3, and the City filed its notice of appeal five days later, ER 2:75-79.

SUMMARY OF THE ARGUMENT

1. The jury's application of *Penn Central* was incorrect as a matter of law. Plaintiff failed to demonstrate the impact of the challenged decisions on its parcel as a whole, either by showing a diminution in property value or the significance of its two years of operating losses in the context of the park's cash flows over its useful life. Plaintiff also failed to show interference with any reasonable investment-backed expectation because, as this Court held in *Colony Cove I*, the City's Ordinance has always given the Board broad discretion to use any method, including MNOI, to decide rent increase applications to avoid unfairly excessive rent increases. Goldstein's knowledge of the City's implementation of the Ordinance, and his selective investigation of prior Board decisions, is also inconsistent with any reasonable expectation. Finally, as the district court concluded as a matter of law, the character of the governmental action is not consistent with a regulatory taking. The Court should therefore reverse the judgment outright.

2. The court never should have asked the jury to apply the *Penn Central* test. Although Plaintiff has a Seventh Amendment right to a jury, it does not have a right to have fundamentally legal questions decided by the jury. Application of the *Penn Central* test as a whole and resolution of its component factors involve numerous

"vexing" legal questions that a jury cannot decide. Even if a court might permissibly delegate some subsidiary factual issues to the jury, the ultimate application of the *Penn Central* factors must be based on interpretation of decades of jurisprudence and thus must be rendered by a court, subject to de novo review on appeal.

3. The district court's jury instructions were woefully inadequate, even if a jury could hope to apply *Penn Central* if properly instructed. They omitted any instruction about the prior judicial application of the factors and thus left the jury to guess about their meaning and application. For example, the court improperly failed to instruct the jury that a governmental action can only be a taking if it has such a severe impact on property rights as to be the functional equivalent of the exercise of eminent domain.

4. The district court erroneously allowed Plaintiff to contradict this Court's holding in *Colony Cove I* that the City did not "change the rules" for rent increases when it amended the Guidelines to clarify that the Board can apply MNOI. This Court's decision was binding on the district court in this case. Plaintiff took advantage of that error: the claim that the City "changed the rules" formed the core of its argument to the jury.

5. The district court remarkably allowed Plaintiff to introduce state judicial decisions in unrelated cases as *evidence* and to argue that the Board's decision violated those decisions as a matter of law. The jury was wholly unprepared to understand the significance—or lack thereof—of these decisions.

6. Plaintiff used the foregoing errors to argue that the City was a bad actor and flagrantly violating the law in issuing the rent increase decisions. Apart from being obviously inflammatory, these arguments are irrelevant to a takings claim, which assumes "otherwise proper" interference with the use of property.

7. The district court fanned the flames of that argument by mistakenly reprimanding the City's counsel, in the presence of the jury, for supposedly violating an in-limine ruling. The district court's belated curative instruction could not remedy the serious prejudice and did not solve the problem that the City could not elicit important testimony from the witness.

8. Plaintiff's *Penn Central* claim remains unripe because Plaintiff did not faithfully comply with this Court's direction in *Colony Cove I* to seek compensation in state court before asserting a federal takings claim. Plaintiff could have presented a *Penn Central* theory to the California courts, which apply that case under state law, but it declined to do so. Such a claim can no longer be asserted given res judicata and the statute of limitations, and thus the judgment should be vacated and the case remanded for dismissal with prejudice.

9. The district court's errors in giving *Penn Central* to a jury, instructing the jury, and admitting and excluding evidence all require a new trial if the Court does not reverse as a matter of law or vacate and remand for dismissal.

10. Even if Plaintiff properly prevailed below, the district court erred in awarding attorneys' fees incurred for Plaintiff's failed litigation in state court.

ARGUMENT

I. As a Matter of Law, Plaintiff Has Not Shown a Taking Under the Multi-factor Balancing Analysis Required by *Penn Central*.

Because application of the *Penn Central* regulatory takings test is a question of law, the jury's application of the test is subject to de novo review. Applying *Penn Central*'s factors here shows that the City did not take Plaintiff's property by granting smaller rent increases than Plaintiff requested. Because Plaintiff has failed to show a taking as a matter of law, reversal without remand is the appropriate remedy.

A. Application of the *Penn Central* Standard Is a Question of Law Subject to This Court's De Novo Review.

This Court described and applied *Penn Central* in another challenge to mobilehome rent control, *MHC Financing L.P. v. City of San Rafael*. In determining whether a regulation caused a taking under *Penn Central,* a court focuses on three primary factors: "the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action." 714 F.3d at 1127 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005)). This multi-factor standard is designed to identify those "'regulatory ac-

tions … that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner.'" *Id.* (quoting *Lingle*, 544 U.S. at 539).

This multi-factor balancing analysis presents "a question of law that is based on factual determinations." *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004). In determining the appropriate standard of review for such questions, this Court has distinguished between applications of law to fact that are "essentially factual" and those, like this one, that are "essentially legal." In *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (en banc), the Court distinguished circumstances in which the question is "essentially factual—one that is founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," from an application that is essentially legal because it requires the appellate court "to exercise judgment about the values that animate legal principles." *Id.* at 1202; *see also United States v. Hinkson*, 585 F.3d 1247, 1259-60 (9th Cir. 2009) (en banc) (applying *McConney*). The *McConney* Court noted that legal issues are likely to predominate in resolving constitutional questions because "the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision." 728 F.2d at 1203.

Application of *Penn Central* is a paradigmatic example of an issue for which legal concerns predominate. It requires the court "to exercise judgment about the values that animate [the] legal princi-

ples" reflected in the Takings Clause and the *Penn Central* test. Indeed, in applying *Penn Central*, the Federal Circuit has held, "recourse to the facts hardly solves the basic problem at hand—there simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the property owner." *Fla. Rock Indus. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994). Rather, "[w]hat is necessary is *a classic exercise of judicial balancing of competing values.*" *Id.* (emphasis added).

"Standing alone, those [*Penn Central*] factors are so general that they provide little guidance." *Branch ex. rel. Me. Nat'l. Bank v. United States*, 69 F.3d 1571, 1579 (Fed. Cir. 1995). To properly apply them, a court must look to the numerous *cases* under the Takings Clause to determine whether the challenged action "goes too far" and is thus in fact an exercise of the eminent domain power rather than the police power. *See id.* at 1579-81; *see also Lingle,* 544 U.S. at 537-40. In other words, *Penn Central* requires that "the court look to the well defined body of law" applying the factors. *See McConney,* 728 F.2d at 1203.

It is therefore unsurprising that courts have always treated application of *Penn Central* as an essentially legal task. The Supreme Court has repeatedly applied the *Penn Central* factors to resolve those claims without remand, necessarily implying that the test presents a question of law fit for appellate de novo review. *See, e.g., Penn Central*, 428 U.S. at 138; *Concrete Pipe & Prods. v. Constr.*

Laborers Pension Tr., 508 U.S. 602, 643 (1993) (holding a court must "subject the operative facts … to the standards derived from our prior Takings Clause cases"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 633, 635 (2001) (O'Connor, J., concurring) (repeatedly referring to what *courts* must consider in applying *Penn Central*).

This Court has consistently done the same. For example, in *Guggenheim v. City of Goleta*, a three-judge panel applied the *Penn Central* factors to find a taking, reversing the grant of summary judgment for the city. *See* 638 F.3d at 1116. Then an en banc panel reapplied the factors and held the challenged mobilehome rent control ordinance had not caused a taking. *Id.* at 1120-22. This has been the Court's consistent practice. *See MHC Fin. Ltd.,* 714 F.3d at 1127-28 (applying *Penn Central* factors to reverse district court judgment finding that mobile home rent control effected a taking); *see also, e.g., Rancho de Calistoga*, 800 F.3d at 1083; *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012); *Scheehle v. Justices of the Supreme Court of Ariz.*, 508 F.3d 887 (9th Cir. 2007); *MacLeod v. Cnty. of Santa Clara*, 749 F.2d 541 (9th Cir. 1984); *William C. Haas & Co. v. City & Cnty. of S.F.*, 605 F.2d 1117 (9th Cir. 1979).

As discussed below, because application of *Penn Central* is fundamentally a legal question, it never should have gone to the jury. *See infra* Section II.A. Regardless, this Court must review the jury's application of *Penn Central* de novo. That review demonstrates that Plaintiff has failed to demonstrate a taking.

B. Plaintiff Failed to Show a Sufficiently Severe Economic Impact to Establish a Taking.

The central concern of takings analysis is the challenged regulation's economic impact on the entirety of the plaintiff's property. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327, 331 (2002) (citing *Penn Central*, 428 U.S. at 130-31); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). This analysis must "*compare* the value that has been taken from the property with the value that remains in the property." *Concrete Pipe*, 508 U.S. at 644 (emphasis added); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007) (analysis must "compare the value of the restriction to the value of the property as a whole so as to determine if there has been severe economic loss"). That comparison is typically framed as a fraction, with the numerator representing the value with the restriction in place and the denominator representing the value without the restriction. *See, e.g., Tahoe-Sierra,* 535 U.S. at 331. Indeed, "one of the critical questions" in takings analysis is determining "the denominator of the fraction." *Concrete Pipe*, 508 U.S. at 644.

In this case, Plaintiff failed to carry its burden of proving the economic impact of the Board's rent increase decisions. Plaintiff offered *no* answer to the "critical question[]" of the denominator: it provided no evidence of the market value of the park (with or without the challenged rent decisions) or its future cash flows without the challenged actions. It thus failed to present the full fraction. This de-

fect is fatal to Plaintiff's claim. *See Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (holding that "insufficient evidence in the record" of economic impact meant that plaintiff failed to carry its burden of proof).

The standard measure of economic impact is to prove the fair market value of the property before the regulatory action—the denominator—and compare it to the property's value after the regulatory action was complete—the numerator. *See, e.g., MHC Fin.,* 714 F.3d at 1127-28; *Goldblatt,* 369 U.S. at 594; *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1268-69 (Fed. Cir. 2009). That fraction reveals the portion of the property's value lost due to the regulation.

Plaintiff made no effort to show any such loss in this case and in fact actively *opposed* admission of any such evidence. Although the jury learned of the 2006 purchase price of the property, $23,050,000, ER 5:741:1-10, Plaintiff put on no evidence whatsoever that the value of the property declined after the Board had rendered its Year 1 or Year 2 decisions. On the contrary, the only evidence of the park's value after the Board's decisions, Goldstein's own testimony, indicated unequivocally that the Board's rent increases *added* to the value of the property. ER 5:714:7-22. Plaintiff thus failed to show *any* adverse impact of the challenged decisions on the market value of the park.

The absence of that evidence was no oversight. Plaintiff successfully brought a motion in limine to ensure that the jury was given *no information* about the value of or revenue from the park after

July 2009 (when the Year 2 application was decided), thus artificially limiting any evidence of the park's value to a two-year snapshot. ER 3:272-73; ER 1:34.

Plaintiff's failure to carry its burden of proof on economic impact is dispositive, but if it were not, the court's exclusion of this acutely relevant evidence would be clear and prejudicial error. The City would have shown that the park's income has significantly increased each year since the Board's rent increase decisions. In Plaintiff's fifth through eighth years of ownership, the Park earned annual profits of $451,440, $624,829, $695,863, and $806,321 due in large part to Plaintiff's refinancing its mortgage. And the City's approval of Plaintiff's applications to convert the park to condominiums and add 15 to 16 non-rent-controlled units added more value to the park. ER 5:711:13-714:22; ER 6:788:1-13. Had the City been permitted to introduce evidence of these subsequent financial benefits, it would have shown that the burden of the $1.2 million interest payments for the initial mortgage, on which Plaintiff based its entire case, were merely temporary and did not prevent Plaintiff from realizing significant profits from the park. The court's error prevented the City from showing the temporary operating losses in the context of Plaintiff's "parcel as a whole." *See Tahoe-Sierra*, 535 U.S. at 331-32.

Plaintiff contends it was not required to prove the market value of the park before and after the rent increase decisions. ER 3:274, 276-79; ER 2:200-01. Courts have sometimes allowed plaintiffs to demonstrate the impact of the regulatory action on the property's

cash flows in lieu of the impact to market value. *See Cienega Gardens,* 503 F.3d at 1280-82. Under that approach, the plaintiff shows the discounted cash flows from the property without the regulatory action—the denominator—as compared to the discounted cash flows with the regulatory action—the numerator. *Id*. at 1282. But like the market value approach, the plaintiff's proof of cash flows must *compare* values before and after the challenged regulatory action and show the impact to the plaintiff's whole property interest.

Plaintiff failed to demonstrate the requisite economic impact under this approach to valuation. Plaintiff claimed the Board's refusal to allow it to pass its interest payments on to the park's residents caused it an operating loss of $1,082,191 in 2007 (ER 5:720:18-722:11) and $812,177 in 2008 (ER 5:725:18-726:15).[5] But isolated information about two years of negative cash flows, without any evidence of the discounted cash flows *over the life of the park* to which to compare those losses,[6] is wholly insufficient to demonstrate a taking even under the *Cienega Gardens* approach to valuation. Indeed, the Federal Circuit rejected a takings claim on precisely that ground in *Rose Acre Farms.* 559 F.3d at 1269 (holding that trial court erred in failing to "compare the 219% diminution in return to anything" and

[5] Plaintiff claimed the denial of the requested increases resulted in a total of $5,738,000 in lost income between December 2008 and January 2017. ER 5:730:17-731:17; ER 6:868:2-11. The jury apparently disagreed, finding a lesser loss of $3,336,056. ER 2:104-06.

[6] Again, Plaintiff itself ensured that no such evidence would come in, by moving in limine to exclude any evidence of economic impact after 2009. *See supra.*

instead "viewed the number [alone] as indicative of a severe economic impact").

Plaintiff owns the fee simple interest in the park, and Goldstein testified that Plaintiff purchased the park as a long-term investment. ER 5:696:10-24; ER 6:824:2-9. Accordingly, the denominator in the takings fraction must take into consideration the full *temporal* extent of Plaintiff's interest in, and revenue from, the property. *See Tahoe-Sierra,* 535 U.S. at 331-32 (impact of temporary moratorium had to be considered in the context of the full duration of the plaintiffs' perpetual fee interests); *Cienega Gardens*, 503 F.3d at 1280-81 (holding that "in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation") (citing, among other cases, *Tahoe-Sierra*, 535 U.S. at 331). Plaintiff failed to carry its burden to show the impact of the Board's decisions on its full property interest.

Plaintiff's reliance on a couple of isolated years of operating losses also flouts the principle that the Takings Clause is not an insurance policy against all financial losses caused by regulation. "Government hardly could go on if to some extent values incident to property could not be diminished" without paying compensation. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Municipalities thus have "broad power to regulate [rents] … without paying compensation for all economic injuries that such regulation entails." *MHC Fin.,* 714 F.3d at 1126-27. Rather, the only regulatory actions that cause takings are those "that are functionally equivalent to the

classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539; *accord Rancho de Calistoga*, 800 F.3d at 1088-89 (citing *Lingle*); *MHC Fin.,* 714 F.3d at 1127 (same).

The challenged regulatory action therefore must cause a truly "*severe* economic deprivation" to the plaintiff. *Cienega Gardens*, 503 F.3d at 1282 (emphasis added). In *MHC Financing,* this Court held that even an *81%* diminution in the value of the plaintiff's mobilehome park was not sufficient to show a taking. 714 F.3d at 1127. This is the consensus position. *See, e.g., Concrete Pipe,* 508 U.S. at 645 (citing cases in which diminutions of 75% and 92.5% were insufficient to show a taking); *William C. Haas & Co.*, 605 F.2d at 1120 (95% diminution not a taking); *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ("[W]e are aware of no case in which a court has found a taking where diminution in value was less than 50 percent."); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

Plaintiff did not come close to showing that the Board's refusal to provide larger rent increases constituted the functional equivalent of the exercise of eminent domain. The only evidence of property value indicated that Plaintiff's property value had in fact *increased* after the Board's decisions. ER 5:711:13-714:22; ER 6:788:2-13. And even ignoring that evidence and assuming that the $3,336,056 in damages

found by the jury was also a loss in property value,[7] it would represent a mere 14 percent diminution: *nowhere near* the economic impact required by the case law.

C. Plaintiff Had No Reasonable Investment-backed Expectation of Passing Through $1.2 Million in Interest Payments to Park Residents.

Penn Central's second factor, the challenged regulatory action's interference with the plaintiff's "reasonable investment-backed expectations," also does not support Plaintiff's claim as a matter of law. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984); *MHC Fin.*, 714 F.3d at 1128; *Guggenheim*, 638 F.3d at 1120-22 (concluding as a matter of law that the plaintiff could have no reasonable expectation of a rent increase). "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus*, 467 U.S. at 1005-06 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)); *accord Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003) ("The subjective expectations of the [plaintiff] are irrelevant."). It "implies reasonable probability, *like expecting rent to be paid*, not starry eyed hope of winning the jackpot." *Rancho de Calistoga,* 800 F.3d at 1090 (quoting *Guggenheim*, 638 F.3d at 1120) (emphasis added).

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[7] This reflects the alleged damages as of December 2008. ER 4:576. If it were properly further discounted to the purchase date in April 2006, this hypothetical impact to the property value would be even smaller.

When a property owner purchases a regulated property with notice of the regulation, its expectations must be consistent with that regulatory program. *See, e.g., Ruckelshaus*, 467 U.S. at 1006; *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 226-28 (1986); *Palazzolo,* 533 U.S. at 634 (O'Connor, J., concurring); *Guggenheim*, 638 F.3d at 1120. The existing regulatory framework is particularly salient "in an area … that has long been … the subject of government regulation" like rent control. *See Ruckelshaus*, 467 U.S. at 1007; *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012) (holding that the plaintiff's "expectations are substantially diminished by the highly regulated nature of the industry in which it operates"). This Court has repeatedly emphasized that a mobilehome park owner's notice of the existing rent control regime makes it unreasonable to expect that it can institute massive rent increases. *See Rancho de Calistoga,* 800 F.3d at 1091; *MHC Fin.,* 714 F.3d at 1128; *Guggenheim,* 638 F.3d at 1120. This principle prevents the Takings Clause from making "Government into an involuntary guarantor of the property owner's gamble that he could [use his property as] he wished despite the existing regulatory structure." *Forest Props. v. United States*, 39 Fed. Cl. 56, 76-77 (1997).

Plaintiff's expectations here were far from objectively reasonable. Goldstein was fully familiar with the City's rent control ordinance, and many of his proposed rent increases at CHV had been denied or reduced by the Board—in fact he had unsuccessfully sued the City over many of them. *See supra* Statement of Facts Section II.

His prediction that the Board would give him massive rent increases was thus nothing more than a gamble, the kind of "hope of winning the jackpot" that will not support a takings claim. *Guggenheim*, 638 F.3d at 1120.

When Plaintiff purchased the park, the Ordinance provided the Board with virtually plenary control of rent increase decisions to ensure that park residents are not subject to excessive rent increases. The Ordinance authorized the Board to "grant such rent increases as it determines to be fair, just and reasonable." ER 4:595-97 (§ 4704(g)). "A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner." *Id.* The Ordinance states the Board must consider 11 enumerated factors, but "no one (1) factor shall be determinative." *Id.*

To be sure, the Guidelines provide that "the Board *may* consider, in addition to the factors specified in § 4704(g) of the Ordinance," a GPM analysis—the methodology that Plaintiff has demanded in this case. ER 4:585 (§ II(B)) (emphasis added). They also provide that mortgage interest expense "*may* be an allowable operating expense." ER 4:584 (§ II(A)(2)(f)) (emphasis added).

But the Board is hardly *obligated* to allow a park owner to pass through its interest expense. The GPM analysis is only "an aid to assist the Board in applying the factors in the Ordinance," and is "to be considered together with the factors in § 4704(g), other relevant evidence presented and the purposes of the Ordinance." ER 4:585 (§

II(B)). The Guidelines expressly state that the GPM analysis is "not intended to create any entitlement to any particular rent increase." *Id*. And section II(A)(2)(f) of the Guidelines provides only that the Board *may* allow interest expense to be passed through in rent increases, and even then, only if "reasonable in light of rents allowed under the Ordinance." ER 4:584 (§ II(A)(2)(f)).

Accordingly, in *Colony Cove I*, this Court held that "[n]either prior nor subsequent to Colony Cove's purchase of the Park did the 1979 Ordinance or the Guidelines require the Board to employ any particular methodology in conducting its review of rental increase applications." *Colony Cove I*, 640 F.3d at 961; *see also id.* at 957. The City's 2006 amendment of the Guidelines therefore did not "alter the effect of the ordinance upon the plaintiffs." *Id.* at 957; *see also Colony Cove Props.*, 220 Cal. App. 4th at 862 (describing that holding in *Colony Cove I*). Rather, it simply made plain what had always been true: the Rent Board had discretion to apply the MNOI methodology in appropriate cases. *Colony Cove I* thus precludes any argument that the City's amendment of the Guidelines interfered with a reasonable expectation. *See also infra* Section III.A (based on *Colony Cove I*, district court should have prohibited Plaintiff from arguing that the City had "changed the rules").

California case law also suggested that the Board could be expected to apply MNOI rather than GPM methodology. Courts have uniformly upheld MNOI as not just constitutional but eminently *sound public policy*. *See Colony Cove Props.,* 220 Cal. App. 4th at

869-71 (use of MNOI methodology repeatedly praised by the courts and commentators for "its fairness and ease of administration"); *see also Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside*, 157 Cal. App. 3d 888, 900-03 (1984); *Palomar Mobilehome Park Ass'n*, 16 Cal. App. 4th at 486.

Plaintiff argued that, regardless of the Board's broad discretion to apply MNOI, Goldstein relied on the Board's past practice to conclude that it would apply GPM and approve his enormous requested rent increases. *See, e.g.,* ER 5:674:12-675:6. However, courts have held that a property owner cannot reasonably assume that an agency will decide to exercise such broad discretion favorably.

In *Appolo Fuels, Inc. v. United States*, for example, the court cited the "broad scope" of the statute that gave the agency discretion to grant a petition to designate the plaintiff's leased lands as unsuitable for mining—an outcome "easily foreseen, not necessarily as a certainty, but as a reasonable possibility." 381 F.3d 1338, 1350 (Fed. Cir. 2004). Although the plaintiff contended its years of experience in the industry had led it to believe a petition "would not be filed in the first instance and once filed, would not be granted" by the agency, the court concluded that the statute "gave notice sufficient to defeat [plaintiff's] reasonable expectations by providing for a process which [the agency] *could* designate lands … under a *broad array of circumstances*." *Id.* at 1349-50 (emphases added). The court underscored that the plaintiff had "identified no regulatory decision pursuant to [the statute] that would have suggested that [petitions for designa-

tion] were unavailable in the [present] circumstances." *Id*. at 1350. Plaintiff in this case has similarly failed to cite any authority suggesting the City could not exercise its broad discretion under the Ordinance to apply the MNOI methodology to decide its rent increase applications.

As the Supreme Court has held, a plaintiff "can hardly argue that its reasonable investment-backed expectations are disturbed" when the agency acts "in a manner that was authorized by law." *Ruckelshaus*, 467 U.S. at 1006-07; *see also 767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580-81 (Fed. Cir. 1995) (finding plaintiff did not have reasonable expectation where statute authorized government's actions and noting that even if power may "rarely be used in the way it was here," the "government never guaranteed … it would not exercise its power"); *Forest Props*, 39 Fed. Cl. at 78 (finding plaintiff did not have reasonable investment-backed expectation in part because "it was at least equally plausible that the [agency] would disagree with [plaintiff] and deny its application for a … permit").

But even if a property owner could legitimately expect that an agency's broad discretion would be applied in a particular way, that expectation would surely need to be based on a *longstanding, uniform, and clear* pattern of application. That did not exist here. Plaintiff claims it expected a specific—and unusually large—rent increase based on a selective smattering of prior Board decisions. Whether willfully or negligently, Plaintiff failed to systematically evaluate the

history of the Board's decisions. Any expectation it had was thus hardly "like expecting rent to be paid." *Rancho de Calistoga,* 800 F.3d at 1090 (quoting *Guggenheim*, 638 F.3d at 1120). In other words, Plaintiff made a *prediction* about how the Board would act, but it was far short of a *reasonable expectation*.

First, Goldstein never once consulted with Board staff when deciding whether to incur $1.2 million in annual interest expense. ER 5:765:2-23. If he had, he would have learned that the $200 rent increase he was relying on was astronomical: it would be *twice as large* as the largest increase awarded in the City's history and that even the prior largest increase had been extraordinary. ER 5:754:7-18. He also would have discovered that when the Board did apply the GPM methodology in the ten years prior to Plaintiff's purchase of the park, the applicants, unlike Plaintiff, had incurred negligible increases in debt service, if any. ER 6:813:8-814:12; ER 4:563-64. In the few cases where the applicant had experienced a significant increase in debt service, as did Plaintiff, the Board used a methodology that did *not* factor in the debt service, denied a rent increase, or excluded a portion of the increased debt service. *Id.*

Second, Goldstein did know from personal experience that the Board had previously refused to pass through debt service—and an amount far less substantial than what he requested here. When he first applied for a $57.85 rent increase for his first park, CHV, shortly after purchasing it, the Board granted a $12 increase, excluding virtually all of the increased debt service. ER 4:566-67; ER 4:616; ER

2:115, 121. And although CHV was a superior park in size and amenities to Colony Cove when Goldstein purchased it, ER 5:751:25-753:6; ER 4:477, Plaintiff's $200 per space/month request here would have made Colony Cove's rents higher than those of CHV. *Id.* Indeed, Goldstein's repeated, unsuccessful attempts to force the Board to grant far less significant increases at CHV should have caused him to discount any prediction that he would receive a far greater increase here. Not only did he fail to persuade the Board in those instances, but he failed to persuade the courts that the Board had erred. *See supra* Statement of Facts Section II.

Third, there were at least three instances in the two years prior to Plaintiff's purchase of the park in which the Board used or considered the MNOI formula. In May 2004, Paradise Trailer Park submitted its first application after changing ownership, and the Board used MNOI and excluded the interest payments on the park's purchase mortgage. ER 5:760:1-761:5; ER 4:569-70. Further, in June and September 2004, the Board considered using MNOI for rent increase applications for Park Villa and Park Granada mobile home parks. ER 5:762:1-764:17; ER 4:622-27; ER 4:628-30; ER 4:634. Goldstein testified that he ignored these decisions. ER 5:698:10-701:23.

Finally, Goldstein's own attorney and real estate consultant, Richard Close, warned him while Plaintiff was considering purchasing the park that the seller's revenue projections for the park were unrealistic because they assumed a massive rent increase that the Board was unlikely to grant. He wrote that the seller's "income pro-

jection and treatment of the City Rent Control Law is false and misleading" and failed "to disclose several key issues in income projection and pitfalls that a new owner would likely face." He concluded, in no uncertain terms, "*In our opinion, a purchaser should not rely on collecting any increased rents from those collected currently*."[8] ER 5:704:2-706:15; ER 4:427-28. Goldstein's supposed expectations were therefore directly contradicted by his own attorney's ominous--and prescient—warning. ER 5:706:9-15.

* * *

In *Guggenheim*, the en banc Court recognized what was at stake when another mobilehome park owner tried to use the Takings Clause to force park residents to absorb massive rent increases. "The people who really do have investment-backed expectations that might be upset by changes in the rent control system are residents who bought their mobile homes after rent control went into effect." 638 F.3d at 1122. Allowing unconstrained rent increases would give the park owner "a windfall" and would be "a disaster for residents who bought their mobile homes after rent control was imposed in the 70's and 80's." *Id.* Plaintiff's requested rent increases would have had a comparable effect: producing a nearly 50 percent increase in average rents overnight.

[8] Goldstein offered self-serving and counterintuitive testimony that the letter was merely a ruse designed to cause the seller to reduce the sale price. ER 5:684:16-686:11. Regardless, his attorney's characterization was exactly correct.

D. The Character of the Governmental Action Supports the City as a Matter of Law, as the District Court Held.

Finally, the "character of the governmental action" also weighs in the City's favor. In explaining the application of that factor, the *Penn Central* Court held, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 123 (citation omitted). The Ordinance here, and the Board's application of it, simply "adjust[ed] the benefits and burdens of economic life to promote the common good."

In applying the character factor, this Court has "consistently given [its] imprimatur to the underlying public purpose of mobile home rent control ordinances and ha[s] characterized them as 'much more an adjust[ment of] the benefits and burdens of economic life to promote the common good than … a physical invasion of property.'" *Rancho De Calistoga*, 800 F.3d at 1091 (quoting *MHC Fin.,* 714 F.3d at 1128 (internal quotation marks omitted)).

The district court agreed with the City—twice—that the character factor supported the City's position as a matter of law. In its orders on the City's two motions to dismiss, the court concluded that "Plaintiff's complaint fails to plead … sufficient facts that the character of the government's action supports a *Penn Central* taking." ER 1:69-70 (citing *MHC Fin.*); ER 1:54-56 (same). Reciting the language

from *Penn Central*, the court held, "The Ordinance and the Board's action is more akin [t]o the second scenario [adjusting the benefits and burdens of economic life to promote the common good] than the first [physical occupation]." ER1:70; ER 1:55.

At no point did the court reconsider these holdings, and indeed it would have had no legal basis for doing so. Accordingly, it has been conclusively established that the character factor supports the City and undermines Plaintiff's *Penn Central* claim. *See, e.g., United States v. Washington*, 235 F.3d 438, 441 (9th Cir. 2000).

II. The District Court Seriously Erred in Sending the *Penn Central* Test to the Jury and then Failing to Properly Instruct the Jury How to Apply It.

Because application of the multi-factor balancing analysis required by *Penn Central* is a question of law (*see supra* Section I.A), the district court should not have abdicated that analysis entirely to the jury. Illustrating the folly of giving the *Penn Central* claim to the jury for decision, the district court also allowed Plaintiff to present several unrelated judicial opinions *as evidence* and then argue their legal significance. *See infra* Section III.B. If these errors could have been partly mitigated by appropriate jury instructions, they were not: the instructions omitted virtually any information about the proper application of *Penn Central* and thus left the jury guessing about how to apply it. Accordingly, if the Court does not reverse on the merits, it must remand for a new trial.

A. Although Plaintiff May Have a Right to a Jury Trial on Discrete Questions of Fact, the District Court Erred in Allowing the Jury to Apply the *Penn Central* Test.

Over the City's objections, the district court allowed the jury not only to find facts relevant to Plaintiff's *Penn Central* claim, but also to decide the numerous questions of law essential to that claim. Most importantly, the court improperly delegated to the jury responsibility for applying the multi-factor *Penn Central* test—a purely legal question—to the facts.

Whether an issue must be tried to a jury is a question of law subject to de novo review. *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 995 (9th Cir. 2000).

1. Application of the Multifactor *Penn Central* Balancing Test Is an Essentially Legal Issue.

In *City of Monterey v. Del Monte Dunes at Monterey Ltd.,* the Supreme Court held that a § 1983 plaintiff, in general, has a Seventh Amendment right to a jury trial. 526 U.S. at 709. However, the Court held that "whether the *particular issues* of liability were proper for determination by the jury" must be determined issue by issue. *Id.* at 718 (emphasis added); *see id.* at 731 (Scalia, J., concurring) ("To say that respondents had the right to a jury trial on their § 1983 claim is not to say that they were entitled to have the jury decide every issue."). This Court has consequently twice held that *Del Monte Dunes* did not require all takings claims to go to a jury. *Hotel & Motel Ass'n*

of Oakland v. City of Oakland, 344 F.3d 959, 966-67 (9th Cir. 2003); *Buckles v. King Cnty.*, 191 F.3d 1127, 1139-41 (9th Cir. 1999).

The Court in *Del Monte Dunes* neither held nor implied that a *Penn Central* claim must be decided by a jury; *Penn Central* was not at issue there. Rather, the case involved two other takings tests: (1) whether the city had deprived the property owner of all economically viable use of its property, and (2) whether the city's action failed to substantially advance a legitimate state interest. 526 U.S. at 701. The Court held that the first test involves a "predominantly factual question" and was therefore proper for the jury to resolve. *Id.* at 720-21. The second test (which the Court later repudiated in *Lingle*, 544 U.S. at 540-45) provided a "more difficult question," as it involved "a mixed question of fact and law." *Id.* at 721. The particular claim advanced there was "essentially fact-bound [in] nature" and therefore appropriate for the jury. *Id.* But the Court emphasized it was *not* adopting a per se rule that all takings claims must go to a jury. *Id.* at 721-22; *see also Buckles,* 191 F.3d at 1140-41.

The *Penn Central* test is unlike both takings tests in *Del Monte Dunes.* As discussed above (*see supra* Section I.A), it presents a complex application of law to facts in which legal questions predominate—questions the Supreme Court has aptly characterized as "vexing." *Lingle*, 544 U.S. at 539. "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts." *Palazzolo,* 533 U.S. at 634 (O'Connor, J., concurring). It requires a "careful examination and *weighing* of all the relevant cir-

cumstances," *Id.* at 636 (O'Connor, J., concurring) (emphasis added): "a classic exercise of judicial balancing of competing values," *Fla. Rock Indus.,* 18 F.3d at 1570. Application of *Penn Central* is thus fundamentally "a question of law that is based on factual determinations." *Bass Enters.*, 381 F.3d at 1365. And this Court and the Supreme Court have again and again balanced—and rebalanced—the *Penn Central* factors without recourse to a trier of fact.[9] *See, e.g., MHC Fin.,* 714 F.3d at 1127-28. Without the context of the extensive case law applying *Penn Central*, a decision maker cannot hope to reach a decision that is not purely arbitrary. *Penn Central* requires the court "to exercise judgment about the values that animate [the] legal principles" reflected in the balancing test and is therefore essentially legal. *See McConney*, 728 F.2d at 1202.

Moreover, as this Court has twice recognized, applying *Del Monte Dunes* to treat all takings questions as inherently factual would prevent takings claims from being resolved without trial. *Hotel & Motel Ass'n*, 344 F.3d at 967; *Buckles*, 191 F.3d at 1140. *Del Monte Dunes* does not mandate that bizarre outcome.

[9] Against the enormous weight of precedent applying the *Penn Central* test as a matter of law at the appellate level, Plaintiff offered only a single district court case in which the *Penn Central* test was sent to a jury. *See David Hill Dev. LLC v. City of Forest Grove*, No. 3:08-cv-266-AC, 2012 WL 5381555, at *18 (D. Or. Oct. 30, 2012).

2. The *Penn Central* Factors Also Individually Involve Legal Decisions.

The *Penn Central* factors certainly involve component facts that, if disputed, can be found by a jury. But even those individual factors also involve predominately legal questions.

The first factor, the severity of the economic impact, may often include a "predominately factual" component, like the empirical question in *Del Monte Dunes* whether a property owner has been deprived of all economically viable use of its property. 526 U.S. at 720. In this case, however, the defect in Plaintiff's showing of economic impact was not factual but legal: even assuming the jury correctly concluded—as a factual matter—that Plaintiff experienced two years of negative cash flows, Plaintiff made no attempt to demonstrate the impact of that loss on either the market value of the property or the full future cash flows from the park. *See supra* Section I.B.

Moreover, the question whether the challenged action's economic impact is so severe as to be the "functional equivalent" of eminent domain is hardly factual. It requires both an understanding of eminent domain and cognizance of the history of "judicial balancing of competing values," *Fla. Rock Indus.,* 18 F.3d at 1570, through which courts have ensured that the Takings Clause does not swallow the police power, *see, e.g., Mahon*, 260 U.S. at 413.

Similarly, on *Penn Central*'s second factor, the nature of the plaintiff's *actual* expectations and investment may be questions of fact. *See Ruckelshaus*, 467 U.S. at 1024 (O'Connor, J., concurring and

dissenting). Nevertheless, *the court* must make the far more important legal determination whether, in light of the facts found by the jury, the plaintiff's expectations were *objectively reasonable*. *See id.* (holding "the District Court found that [the plaintiff's] expectations existed as a matter of fact *and were reasonable as a matter of law*" (emphasis added)). Juries do decide the reasonableness of behavior in some factual contexts. But the investment-backed expectations factor asks whether those expectations were reasonable in light of existing *law*. *See, e.g., Guggenheim*, 638 F.3d at 1120-21; *see also supra* Section I.C. That particular reasonableness determination thus must be considered "essentially legal."

In fact, the trial here perfectly exemplifies the practical problems in giving this issue to a jury: Plaintiff was allowed introduce judicial decisions *as evidence* and then argue about their legal significance or lack thereof. *See infra* Section III.B. For example, Plaintiff's counsel asked Goldstein about *Carson Gardens, LLC v. City of Carson Mobilehome Park Rental Review Board*, 135 Cal. App. 4th 856 (2006), and *Palacio de Anza v. Palm Springs Rent Review Commission*, 209 Cal. App. 3d 116 (1989), two cases he purported to rely on in purchasing the park, and in doing so, counsel read long passages from the opinions into the record. (ER 5:677:7-679:11, 679:13-681:9; *see also* ER 5:716:6-717:15 (counsel reading more from *Carson Gardens*); 6:815:3-818:25, 819:14-820:3 (same; and questioning the City's expert about the case). Plaintiff then made the *Carson Gardens* case a prominent focus of its closing. ER 6:843-44, 849-51, 855-56, 862-63;

ER 6:900-01, 908. Although the City struggled to explain to the jury why these cases were inapt, ER 5:718:4-719:9; ER 6:803:19-805:21; ER 6:881:8-882:15 it was put in the bizarre position of arguing the law to a jury with no experience or training to understand its niceties. This would not have been an issue in a bench trial.

Finally, the "character of the governmental action" is an issue of pure law, as the district court demonstrated by twice resolving that factor—against Plaintiff. *See supra* Section I.D. The court's conclusion was inherently one of law, as it was rendered on motions to dismiss. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988). The court nonetheless gave the same issue to the jury (and without *any* instruction about its meaning, *see infra* Section II.B).

B. The District Court Compounded Its Error by Instructing the Jury with an Incomplete and Incorrect Statement of the Law.

Even if the district court had been right to allow the jury to apply the *Penn Central* test, it failed to properly prepare the jury for that daunting task. The court's instruction on the regulatory takings standard, Instruction No. 15, was so conclusory that it failed to provide any meaningful direction to the jury. ER 2:102-03.

Jury instructions must "fairly and adequately cover the issues presented, correctly state the law, and … not [be] misleading." *Mockler v. Multnomah Cnty.*, 140 F.3d 808, 812 (9th Cir. 1998); *see also L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1398 (9th Cir. 1984) ("The question … is whether … the trial judge gave adequate instructions on each element of the case to insure that the jury fully

understood the issues."). This Court reviews de novo whether jury instructions misstate the law, *Gulliford v. Pierce Cnty.*, 136 F.3d 1345, 1348 (9th Cir. 1998), including when a party challenges a "jury instruction as an incomplete, and therefore incorrect, statement of the law," *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

Instruction No. 15 (ER 2:102-03) purported to provide the applicable standard for a regulatory taking. It began with the vague instruction that "the government must compensate the owner of private property when it requires a person or persons alone to bear public burdens which, in all fairness, should be borne by the public as a whole." ER 2:102. It restated that principle, without elaboration. *Id.*

The instruction then enjoined the jury to "consider and balance all the circumstances in the case" and reprinted, verbatim, the three primary factors as set out in *Penn Central*. *Id.* Its only explanation of the three factors came in stating that Plaintiff's expectations must be "objectively reasonable" from the perspective of a reasonable investor in Plaintiff's position. ER 2:102.

Instruction 15 does little more than parrot the phrasing of the three factors in *Penn Central* and the general philosophical underpinning of the Takings Clause. The instruction utterly fails to explain the wealth, and nuance, of the law that courts have developed in applying these factors. "Standing alone, those [*Penn Central*] factors are so general that they provide little guidance." *Branch*, 69 F.3d at 1579. "More instructive," the court held in *Branch*, "is the manner in which the [Supreme] Court applied those factors." *Id.* (ap-

plying cases). Here, the jury received none of the guidance from the numerous appellate decisions in which courts have sought to make sense of the *Penn Central* factors.

The City specifically identified omissions from the instruction and proposed language to improve it. *See* ER 2:242-43, 246-50; ER 2:202, 211-12, 214-18; 2:172, 181-82, 185-89; ER 2:145, 158-59, 163-66; ER 1:21:10-26:25. To address the omission of any instruction about the required severity of economic impact, the City argued that Plaintiff must show a "diminution in value so severe that the [government action] has essentially appropriated their property for public use," and that even a substantial, 75% or 87%, reduction in the property's value is not sufficient. ER 2:248 (citing *Garneau v. City of Seattle,* 147 F.3d 802, 807-08 (9th Cir. 1998), and *MHC Fin.,* 714 F.3d at 1127-28); *see also* ER 2:216; ER 2:187; ER 2:164.

The court also improperly refused the City's proposed instruction about the polestar for takings analysis: the Takings Clause requires compensation only for those "'regulatory actions … that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner' with the inquiry 'focus[ing] directly upon the severity of the burden that government imposes upon private property rights.'" *MHC Fin.,* 714 F.3d at 1127 (quoting *Lingle*, 544 U.S. at 539); *see* ER 1:30:1-31:1; ER 2:6; *see also* ER 2:215; ER 2:186; ER 2:164. Lacking that instruction, the jury was at a loss to understand that only the *most severe* economic impacts can qualify as a taking. *See supra* Section I.B.

Although the instruction mentioned the "character of the governmental action," the court omitted any instruction on the meaning of the phrase, which is hardly self-explanatory. ER 2:248; ER 2:102-03; ER 2:216: ER 2:187; ER 2:165. The City proposed the language used in *Penn Central* and this Court's decision in *MHC Financing*. *Id*. Without such an instruction, the district court plainly did not give "adequate instructions on each element of the case to insure that the jury fully understood the issues." *See L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1398.

In any event, the court had *twice* previously held, as a matter of law, that the character factor undercut Plaintiff's claim. *See supra* Section I.D. Accordingly, the court erred in failing to instruct the jury of that legal conclusion.[10] *See, e.g., In re United States*, 316 F.3d 1071, 1073 (9th Cir. 2003).

The failure to give instructions adequately explaining the *Penn Central* analysis makes this case similar to *Norwood v. Vance*. In that Eighth Amendment case, this Court reversed for failure to give an additional jury instruction about the deference owed to prison officials' judgments about managing prison populations. 591 F.3d at 1066-67. Although the Court concluded that the district court's in-

[10] To make matters worse, over the City's objections, the court allowed testimony about an investigation of the City's Mayor (who does not even serve on the Board), thereby allowing Plaintiff's counsel in closing to incorrectly argue that the motivations of City officials are relevant to the character of government action. *See infra* Section III.C.

struction was correct, as far as it went, "the court's failure to give *additional* guidance on deference rendered the instruction incomplete and misleading." *Id.* at 1067 (emphasis added); *see also Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1234-35 (9th Cir. 2011) (reversing for failure to give additional instruction where "the legal principle in [the proposed] instructions … cannot be readily deduced from" a general instruction given).

The instruction's omissions are not cured by its (repeated) reference to a general notion of "justice and fairness." ER 2:102. Without more guidance, that instruction could only suggest to the jurors that they could rely on inchoate gut instincts of fairness and provided no explanation about how to apply the principle to the case before it. The "justice and fairness" injunction is vague, to say the least, and in the hands of a jury with no context about the historical application of the Takings Clause, could only lead to an arbitrary conclusion. *Cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 48 (1991) (O'Connor, J., dissenting) ("Vague references to 'the character and the degree of the wrong' and the 'necessity of preventing similar wrong' do not assist a jury in making a reasoned decision; they are too amorphous. They restate the overarching principles of punitive damages awards to punish and deter without adding meaning to these terms.").

The district court's instructions plainly failed "to insure that the jury fully understood the issues." *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1398. Without additional, more precise instruction, the

jury could not hope to properly apply *Penn Central,* if ever a jury could do so.

III. The District Court's Numerous Erroneous Evidentiary Decisions Allowed Plaintiff to Mislead the Jury and Improperly Impugn the City.

Beyond erroneously asking the jury to apply *Penn Central*, and then erroneously failing to prepare the jury for that task, the district court made a variety of prejudicial errors in admitting and excluding evidence that hopelessly tainted the record.

A. The Trial Was Pervasively Infected by Plaintiff's Argument that the City Had "Changed the Rules," Which Was Precluded by This Court's Holding in *Colony Cove I*.

Plaintiff's mantra in the district court was that the City had "changed the rules" by amending the non-binding Guidelines to clarify that the Board could apply an MNOI methodology. Plaintiff's complaint was rife with references to it (ER 3:354 ¶ 4, 359-60 ¶ 22, 361 ¶ 28, 363 ¶¶ 38, 40, 370 ¶ 65), and it formed the basis of many of Plaintiff's legal arguments to the district court (*e.g.,* ER 3:271-79, 283, 256). Most importantly, it dominated Plaintiff's case to the jury. Plaintiff's counsel asked two witnesses about this theory on direct and cross-examination. *See, e.g.,* ER 5:688:6-689:18 (Plaintiff's counsel asking Goldstein on direct, "When you were buying Colony Cove, did you believe the City could change the rules on you without protecting your investment?"); ER 5:693:9-13; ER 5:770:2-772:25. In fact, the theme was the alpha and omega of Plaintiff's case: Plaintiff's counsel used this or a similar phrase 12 times in opening argu-

ment and 17 times in closing and rebuttal. ER 5:640:23-657:23 (arguing in opening, "You will decide if it is fair and reasonable to switch the rules like that right after someone spends millions of dollars buying a property in reliance on the rules."); ER 6:840:16-871:7 (Plaintiff's Closing); ER 6:899:20-910:15 (Plaintiff's Rebuttal).

But that argument was *patently false*, as this Court held in *Colony Cove I*. The district court nevertheless refused the City's motion in limine to exclude any evidence and argument that the City had "changed the rules" as inconsistent with *Colony Cove I*. ER 3:284-293; ER 1:36. And it refused to instruct the jury that this Court's holding precluded any such argument.[11] ER 2:170-71, 2:144, 2:134. As a result, the jury was left with the mistaken impression that the City had "changed the rules" after Plaintiff purchased the park and thus unfairly upset Plaintiff's investment-backed expectations. The court's refusal to exclude this line of argument and evidence supporting it was incorrect and severely prejudicial.

Evidentiary rulings are reviewed for an abuse of discretion. *See Valdivia v. Schwarzenegger*, 599 F.3d 984, 993-94 (9th Cir. 2010). However, "[t]he application of issue preclusion … is reviewed *de novo*." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 745 (9th Cir. 2006). This Court reviews de novo whether jury instructions misstate or omit material aspects of the law. *See supra* Section II.B.

[11] The City also unsuccessfully argued twice in motions to dismiss that the argument was barred by issue preclusion. ER 3:380-84; ER 3:349-52; ER 1:69; ER 1:53.

Evidentiary rulings will be reversed if the errors, individually or cumulatively, "more likely than not affected the verdict." *Henry v. Lehman Commercial Paper, Inc. (In re First Alliance Mortg. Co.)*, 471 F.3d 977, 999 (9th Cir. 2006).

This Court held—clearly and repeatedly—in *Colony Cove I* that the 2006 Guidelines amendment did not "change the rules" applicable to the Board's decisions; the Board was free to apply the MNOI methodology both before and after the 2006 amendment. This Court concluded that the Guidelines did not have the force of law, and thus that the 2006 amendment did not change the Board's authority to disallow a pass-through of an applicant's debt service. In rejecting Plaintiff's due process claim on the merits, this Court held, "Since 1979, the Ordinance has provided that … the Board must consider the 11 statutory factors, the Guidelines, and any other relevant factors. The 1979 Ordinance requires only that the Board consider all the factors, and it expressly states that *no one factor is determinative*." 640 F.3d at 961 (emphasis added). Crucially, the Court went on to hold,

> Neither prior nor subsequent to Colony Cove's purchase of the Park did the 1979 Ordinance or the Guidelines require the Board to employ any particular methodology in conducting its review of rental increase applications. Instead, the Amended Guidelines expressly state that neither the GPM nor the MNOI analysis is "intended to create any entitlement to any particular rent increase."

Id. The Court reached the same conclusion in rejecting Plaintiff's facial takings claim based on the statute of limitations: because the

2006 amendment did not alter the Ordinance, it could not restart the statute of limitations for a challenge to it. *Id.* at 957. In sum, the Court held that the City's amendment to the non-binding Guidelines did not "change the rules" for rent increase applications.

This Court's decision was binding on the district court in two ways. First, issue preclusion prohibited Plaintiff from relitigating the Court's holding. "Issue preclusion … bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). A federal court judgment has issue preclusive effect in a later federal action if

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.

Reyn's Pasta Bella, 442 F.3d at 746.

These elements are satisfied here. The parties are identical and the issues are as well: whether the City "changed the rules" applicable to rent increase decisions by amending the Guidelines in 2006 to clarify that the Board could apply MNOI. And the *Colony Cove I* decision was on the merits. This Court construed the Ordinance and

Guidelines in holding that the City's action on the rent increase applications did not violate substantive due process.[12] 640 F.3d at 961.

Second, regardless of the preclusive effect of *Colony Cove I*, the decision bound the district court as a matter of stare decisis. *See, e.g., In re Staff Mortg. & Inv. Corp.*, 625 F.2d 281, 282-83 (9th Cir. 1980) (prior Ninth Circuit decision was not law of the case but was precedent binding the district court). The principle that the Guidelines did not alter the effect of the Ordinance on Plaintiff was essential to the Court's holding that it did not restart the statute of limitations. 640 F.3d at 957 (citing *Action Apt. Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2011)). And the Court's conclusion that the Ordinance did not require the Board to apply any particular methodology "[]either prior []or subsequent to Colony Cove's purchase" was the basis of its holding that the Board did not act arbitrarily by applying MNOI. *Id.* at 961. The district court was bound by these conclusions.

The court might have mitigated its error in refusing to exclude evidence and argument on the topic if it had properly instructed the jury. The City requested instructions that the Ordinance and Guidelines never required the Board to use any particular method in reviewing rent increase applications and an instruction that the 2006

[12] That this issue was decided as part of the Court's holding on a substantive due process claim rather than a takings claim is irrelevant. *See Taylor*, 553 U.S. at 892 (issue preclusion bars relitigation of an issue "even if the issue recurs in the context of a *different claim*" (emphasis added)).

Guidelines amendment did not change the effect of the Ordinance on Plaintiff. ER 2:142-44; ER 2:132-34; ER 2:168-70. The court declined both. ER 6:831:1-832:1; ER 2:99-103. As a result, the instructions provided a materially incomplete statement of the law. *See Norwood,* 591 F.3d at 1066.

The district court's refusal to give binding effect to this Court's holding in *Colony Cove I*, whether by preclusion or precedent, prejudiced the City. It allowed Plaintiff, by reiterating the handy catchphrase that the City had "changed the rules," to argue again and again to the jury that the City had unfairly pulled the rug out from under Plaintiff. This theme cut to the heart of one of the essential elements of Plaintiff's claim: reasonable investment-backed expectations. *See supra* Section I.C. Moreover, Plaintiff's incessant repetition of this theme emphasizes the central role Plaintiff intended it to play in the jury's decision. The trial's saturation with the topic makes it inconceivable that this argument was not a significant factor in the jury's verdict against the City. *See United States v. Brown*, 880 F.2d 1012, 1016 (9th Cir. 1989).

B. The District Court Improperly Allowed Plaintiff to Introduce Wholly Unrelated Judicial Opinions as Evidence.

The district court allowed Plaintiff to introduce a decision in an unrelated state court case, *Carson Gardens, LLC v. City of Carson Mobilehome Park Rental Review Board*, 135 Cal. App. 4th at 856. ER 5:677:15-23; ER 4:607-14. Plaintiff repeatedly used the *Carson Gardens* decision to suggest—incorrectly and improperly—that the City

had violated the law by refusing to use the GPM methodology in *this* case.[13] *E.g.,* ER 5:653:20-654:19, 677:7-679:11; ER 5:716:1-717:24; ER 5:766:21-770:14, 772:16-25; ER 6:789:19-791:16,815:3-820:3; ER 6:843:21-844:9, 849:2-851:12, 855:14-856:23, 862:18-863:4; ER 6:900:2-901:10. Plaintiff could use this gambit only because the district court rejected the City' motion in limine to exclude the decision. ER 1:37; *see also* ER 3:263-70; ER 2:190-93. *Carson Gardens* was inadmissible as irrelevant, incorrect as a matter of law, and subject to abuse, as Plaintiff's closing amply demonstrated. ER 6:843:21-844:9, 849:2-851:12, 855:14-856:23, 862:18-863:14; ER 6:900:2-901:10, 908:16-23.

The owner of the Carson Gardens mobilehome park sued the City after the Board declined to use the GPM method to allow the owner to pass through interest expenses. *Carson Gardens*, 135 Cal. App. 4th at 860-61. The trial court ordered the Board "[t]o apply the [GPM] analysis discussed in the Guidelines … or another reasonable analysis or methodology" that accounts for acquisition expenses. *Id.* at 862. *The City did not appeal that judgment*, but rather awarded a larger rent increase based on the MNOI methodology. *Id.* at 862-864. The superior court then held the Board's new increase did not comply with the judgment.

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[13] Over the City's objection (ER 5:679:22-25, 707:22-25), the court also allowed Plaintiff to introduce another case, *Palacio de Anza v. Palm Springs Rent Review Commission*, 209 Cal. App. 3d at 116, which involved a different city's application of a different rent control ordinance, and in which that city *did* change the rules after the park owner's purchase. ER 6:807:5-23.

In January 2006, the court of appeal affirmed, holding only that the Board had not complied with the prior, unappealed trial court judgment. *Id.* at 866-67. Crucially, because the only issue before the court was whether the Board had complied with that judgment, the court of appeal had to *assume* that the prior judgment correctly concluded that the Ordinance required consideration of debt service expenses in that case.[14] *Id.* The court thus expressly declined to address whether MNOI was proper under the Ordinance. *Id.* at 867.

By the time of trial in this case, however, the *Carson Gardens* superior court's view of the Ordinance had been authoritatively repudiated. This Court had held in *Colony Cove I* that the Ordinance does *not* require the Board to use GPM, MNOI, or any other particular methodology in considering a rent increase application. *See supra* Section III.A; *see also* ER 2:191-93. And the California court of appeal in *Colony Cove Properties* emphatically upheld the use of MNOI under the Ordinance, holding that it "has been approved by multiple courts"—and indeed "upheld by every court to have considered it"—that it is "constitutionally valid," and that it has been "praised by courts and commentators for its 'fairness and ease of administration'." 220 Cal. App. 4th at 869-70. In other words, the superior court

[14] The court nonetheless implied that it disagreed with the superior court's decision but was constrained not to question it. 135 Cal. App. 4th at 866.

decision in *Carson Gardens* was inarguably wrong as a matter of law.

The City moved to exclude the *Carson Gardens* decision and bar Plaintiff from arguing that it showed the Ordinance prohibited the Board from applying the MNOI methodology. ER 3:266-70; ER 2:191; *see also* ER 2:120. Plaintiff responded that the City's preclusion argument was a "red herring" because Plaintiff had no intention of so using the *Carson Gardens* judgment and instead sought only to show that Plaintiff relied on the decision before purchasing the Colony Cove park. ER 2:223-29. The court denied the City's motion. ER 1:37.

But contrary to its representation in opposing the motion, Plaintiff repeatedly used *Carson Gardens* to argue that the Board had violated the law, as supposedly embodied in the *Carson Gardens* decision, when it applied MNOI in this case. For example, Plaintiff argued in closing that *Carson Gardens*

> says that they [City] disregarded that order, they tried to circumvent it. And they went back to the judge, and he said stop…no, you have to do what we are telling you. Now, how much contempt and disregard must Carson have for the rule of law and the judicial system if they can stand before you and say they were legally authorized to use any formula they wanted in 2006 when Mr. Goldstein purchased the Park?

ER 6:849:2-851:12; *see also, e.g.,* ER 6:843:21-844:9, 855:14-856:23, 862:18-863:4; ER 6:900:2-901:10, 908:16-23.

The district court should have excluded the *Carson Gardens* decision because it did not provide the applicable law for this action and could only mislead the jury into believing otherwise. *See* ER 3:263-70, ER 2:191-93. As this Court has sensibly held, "In the orderly trial of a case, the law is given to the jury by the court and not introduced as evidence." *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974). "Obviously," the Court continued, "it would be most confusing to a jury to have legal material introduced as evidence *and then argued as to what the law is or ought to be." Id.* at 1254 (emphasis added).

That is precisely what happened in this case. The jury was in no position to understand the fine points of the law of the case doctrine necessary to see the narrow limits of the court of appeal's holding in *Carson Gardens*.

C. Plaintiff Misused *Carson Gardens* and Other Evidence for the Irrelevant and Prejudicial Purpose of Impugning the City's Good Faith.

Plaintiff also repeatedly attempted to smear the City as a dishonest scofflaw. This evidence and argument was entirely irrelevant to the takings claim before the jury and unfairly prejudicial to the City.

Based on *Carson Gardens*, Plaintiff's counsel argued that the City must have "contempt and disregard … for the rule of law and the judicial system," and that the City should "[s]tand up and admit that the trial judge in *Carson Gardens* busted [the City] for not following [its] own rules." ER 6:849:2-851:15, 856:1-23. Counsel told the

jury that he "just won't stop talking about *Carson Gardens*" because "it's not okay for the City to disregard and ignore what a court of law tells them." ER 851:3-8. Based on *Carson Gardens*, Plaintiff's counsel also asked Goldstein if he thought it appropriate for the City to violate a court order. After the City's objection was sustained, counsel repeated, "would you find it acceptable if the City were to violate a court order?" ER 5:714.1:20-715:4. Finally, counsel repeatedly argued that *Carson Gardens* showed the City was lying about the effect of the 2006 Guidelines amendment. *E.g.,* ER 6:848-51, 855-56.

Moreover, Plaintiff repeatedly elicited testimony about supposed political interference in the Board's process (*e.g.,* ER 5:693:14-695:7; ER 5:715:6-18), including irrelevant questioning about a former City mayor, Jim Dear, who had been investigated for unrelated misconduct (even though the mayor is not a member of the Board). ER 5:773:24-777:18, 778:20-779:21, 780:12-20; ER 6:792:18-796:6.

The City correctly objected that these arguments and evidence were irrelevant to a *Penn Central* claim and unfairly prejudicial. ER 3:257-62; ER 2:198-99; ER 1:33; ER 5:778:20-779:21; ER 5:714.1:20-715:6. In *Lingle,* the Supreme Court clarified that the alleged invalidity or impropriety of the government's action is irrelevant to takings analysis because it "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated." 544 U.S. at 543. The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" *Id.*

(quoting *First English Evangelical Lutheran Church v. L.A. Cnty.*, 482 U.S. 304, 315 (1987)).

Accordingly, whether the government has acted improperly, unwisely, or with improper animus is not relevant to whether it caused a taking. *See Garneau*, 147 F.3d at 814 (Williams, Dist. J., concurring) (takings clause not applicable where challenge is made "on the grounds that the government has acted *ultra vires* by enacting legislation that is inherently wrongful and unfair"); *García-Rubiera v. Fortuño*, 665 F.3d 261, 277 (1st Cir. 2011) (rejecting takings claim based on alleged "'misuse' of governmental powers").

Whether the City complied with a judgment in another, unrelated case "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated" by the rent increase decisions at issue in *this case*. Similarly, whether a former mayor had intervened in the Board's process is irrelevant to the objective impact of that process on Plaintiff's property. The evidence and argument on these subjects therefore should have been excluded.

D. The Court's Admittedly Erroneous Censure of the City's Counsel and Exclusion of Evidence Was Seriously Prejudicial.

The district court added fuel to Plaintiff's inflammatory argument that the City knowingly violated the law when the court dressed down the City's counsel based on the court's admittedly erroneous belief that she was violating an in-limine order. ER 6:786:19-787:16. The court stated,

> This is the subject of a motion in limine. You have violated the Court's order. That is struck. That testimony is struck… . I've warned you once already outside the presence of the jury. Now I'm admonishing you now. We are not going into this area. I told you not to do it in front—when the jurors weren't present. Now I'm telling you in front of the jurors, don't violate the Court's order again.

ER 6:787:6-14. It then cut off counsel's effort to explain: "Don't argue with me. Next question." ER 6:787:16.

A court can cause severe prejudice by chastising counsel in the jury's presence. *See United States v. Spears*, 558 F.2d 1296, 1298 (7th Cir. 1977); *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 808 (6th Cir. 1999) (holding "belittling of counsel is ordinarily reversible error"). This is because "the influence of the trial judge on the jury is necessarily and properly of great weight, and … his lightest word or intimation is received with deference, and may prove controlling." *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972). The court's comment here served to "belittle the lawyer in the eyes of the jury" and "unnerve [her] and throw [her] off balance so that [s]he could not devote [her] best talents to the defense of [her] client." *United States v. Kelley*, 314 F.2d 461, 463 (6th Cir. 1963).

After the City requested reconsideration, ER 2:125-27, the court admitted its error and tried to unring the bell—the next day—by instructing the jury to disregard it. ER 6:836:12-838:7, 839:9-21. Not only was that a day late, it was a dollar short given Plaintiff's counsel's closing motif of the City's supposed contempt for the law. ER 6:849:2-851:12; *see also Dellinger*, 472 F.2d at 386 (instructions

"do not cure a comment of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence"). That instruction also could not cure the court's error in telling the jury about its prior sidebar admonishment. *See Spears,* 558 F.2d at 1298 (a "reprimand or censure should have been made outside the presence of the jury").

Regardless, the court's error had more concrete consequences: it prevented the City from questioning the witness about Goldstein's extensive history of unsuccessful litigation against the City as owner of CHV to show that he could not have had a reasonable expectation of receiving a $200 rent increase to justify the park's purchase price. *See supra* Section I.C and Statement of Facts Section II; ER 2:126-27. By the next day, when the court acknowledged its error, the witness had left the stand and would not return.

IV. Plaintiff's *Penn Central* Claim Remains Unripe Because Plaintiff Failed to Allege a *Penn Central* Taking in State Court.

Plaintiff failed to ripen its takings claim in the California courts as this Court required in *Colony Cove I. See* 640 F.3d at 957-59. Although it filed suit in state court, Plaintiff never alleged the *Penn Central* takings theory it now asserts, even though California courts apply the same theory under California law. Its takings claim therefore remains unripe, and this Court should therefore vacate the judgment and remand for dismissal with prejudice.

As this Court recognized in *Colony Cove I,* a plaintiff must first be denied compensation in state court to ripen a federal takings claim. 640 F.3d at 958 (citing *Williamson Cnty.,* 473 U.S. at 194). Unless the state court has denied the plaintiff compensation, "'[t]here is no constitutional injury,'" and the plaintiff has no Fifth Amendment takings claim. *Id.* (quoting *San Remo Hotel v. City & Cnty. of S.F.*, 145 F.3d 1095, 1102 (9th Cir. 1998)).

California provides an adequate judicial procedure under Article I, Section 19 of the California Constitution for property owners to seek compensation. *See id.* at 958. California courts construe the state takings clause "congruently" with the federal clause and apply federal takings cases in doing so. *See San Remo Hotel, L.P. v. City & Cnty. of S.F.,* 545 U.S. 323, 332 (2005) (quoting *San Remo Hotel v. City & Cnty. of S.F.*, 27 Cal. 4th 643, 664 (2002)). They have thus repeatedly applied the *Penn Central* test, including in rent control cases. *See, e.g., Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 775-76, 780 (1997); *Lockaway Storage v. Cnty. of Alameda*, 216 Cal. App. 4th 161, 184-87 (2013).

Plaintiff therefore should have filed a claim in state court based on *Penn Central*, which might have obviated this federal action. Plaintiff instead claimed in state court only that the Board failed to provide Plaintiff with a "fair return." *See* ER 3:302 (writ petition); *Colony Cove Props.,* 220 Cal. App. 4th at 863. When this Court routed Plaintiff to state court to seek compensation, it surely did not intend that Plaintiff seek compensation solely on a *different* ground

from that asserted in the once and future federal cases. In fact, this Court directed Plaintiff to seek compensation under *Kavanau v. Santa Monica Rent Control Board, see Colony Cove I*, 640 F.3d at 958-59, in which the California Supreme Court applied *Penn Central*, *see Kavanau*, 16 Cal. 4th at 780. Plaintiff thus cannot claim to have been denied just compensation by the state courts when it failed to *ask* for just compensation on the available grounds. Ripeness is not a mere check-the-box formality.

The City raised ripeness in the district court, but not on the basis asserted here. *See* ER 3:376, 378. However, because the ripeness issue is "purely one of law," this Court can consider it for the first time on appeal. *See In re Prof'l Inv. Props.*, 955 F.2d 623, 625 (9th Cir. 1992).

Where a state compensation claim is no longer available, the unripe federal takings claim must be dismissed *with prejudice*. *See Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002) (state law claim would be barred by statute of limitations); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003). In this case, the res judicata effect of the prior state judgment would now bar Plaintiff from asserting a *Penn Central* claim in state court. *See, e.g., Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara,* 604 F.3d 1142, 1149 (9th Cir. 2010) (holding California preclusion law barred later case asserting same "primary right" whether or not based on the same "theories of recovery"). Similarly, the statute of limitations on that claim has long since expired. *See Bookout v. State*

of Cal. ex rel. Dept. of Transp., 186 Cal. App. 4th 1478, 1483-84 (2010) (state takings claims subject to either three- or five-year limitations periods). This Court should therefore vacate the judgment and remand with direction to dismiss the case with prejudice. *See, e.g., S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 500 (9th Cir. 1990).

V. Plaintiff Is Not Entitled to Attorneys' Fees Incurred in the State Court Litigation.

In granting Plaintiff's motion for attorneys' fees, the district court awarded Plaintiff fees and costs of $443,366.25 for work performed in the state court proceedings. ER 1:5-8. The district court erroneously found those fees and costs were incurred in enforcing rights under § 1983. ER 1:6-8. If the judgment is not reversed, vacated, or remanded for a new trial, the judgment must be modified to reduce the fee award.

Attorneys' fees may be recovered under § 1988 by a prevailing party in "action or proceeding to enforce a provision of" § 1983 and other specified federal statutes. However, as just described, "there is no constitutional injury until the plaintiff" has been denied compensation by the state courts. *Colony Cove I*, 640 F.3d at 958 (quoting *San Remo Hotel*, 145 F.3d at 1102). Plaintiff's claim under § 1983 thus did not accrue until Plaintiff had obtained a final ruling from the state courts concluding Plaintiff was not entitled to compensation under state law.

Further, by making a reservation in the state court under *England v. Medical Examiners,* 375 U.S. 411 (1964), Plaintiff made clear that it was *not* pursuing claims under the Fifth Amendment and § 1983 in the state court proceedings. *See Colony Cove Props.*, 220 Cal. App. 4th at 863. Thus the state court proceedings were not undertaken to enforce rights under § 1983; they were undertaken to pursue state remedies that, if granted, would obviate Plaintiff's § 1983 claim. *Webb v. Bd. of Educ. of Dyer County,* 471 U.S. 234, 241 (1985) (proceedings to enforce tenure rights under state law are not part of proceedings to enforce § 1983).

That Plaintiff lacked a ripe federal claim—and indeed still lacks one—until after it had been denied compensation in state court distinguishes this case from others in which fees were awarded for legal work in state court proceedings undertaken pursuant to federal preemption doctrines or administrative proceedings. *See, e.g., Bartholomew v. Watson,* 665 F.2d 910, 914 (9th Cir. 1982).

Because Plaintiff was not enforcing its § 1983 rights in the state court proceedings, and did not even prevail in those cases, Plaintiff is not entitled to an award of fees and costs accrued in those proceedings. Accordingly, if the judgment is not reversed, the award must be reduced by $443,366.25.

CONCLUSION

In light of the cacophony of error in this case, the verdict cannot stand. Given that Plaintiff cannot show a taking as a matter of law, this Court should simply reverse the judgment. If the Court

concludes that Plaintiff should have brought its *Penn Central* claim in state court, the Court should vacate the judgment and remand with direction to dismiss with prejudice. Finally, even if the case is ripe and the judgment cannot be simply reversed, the Court must remand for a new bench trial and one uncorrupted by the district court's numerous evidentiary errors.

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STATEMENT OF RELATED CASES

Defendants and Appellants are unaware of any related cases currently pending in this Court. However, this Court previously decided a case between the same parties and arising from the same transactions: *Colony Cove Props., LLC v. City of Carson,* Docket No. 09-57039. *See* 640 F.3d 948 (9th Cir. 2011)

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 19,012 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced roman typeface, 14-point New Century Schoolbook, using Microsoft Word 2010.

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