No. 08-59

In the Supreme Court of the United States

ROLE MODELS AMERICA, INC., PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
ANTHONY J. STEINMEYER
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly interpreted its own mandate in an earlier appeal.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-7a, 54a-66a) are reported at 514 F.3d 1308 and 317 F.3d 327, respectively. The opinion of the district court that was the subject of the second appeal (Pet. App. 8a-28a) is reported at 459 F. Supp. 2d 28. One earlier opinion of the district court (Pet. App. 29a-53a) is unreported, and another opinion (Pet. App. 67a-93a) is reported at 193 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2008. A petition for rehearing was denied on April 11, 2008 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on July 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Base Closure and Realignment Act of 1990 (DBCRA), Pub. L. No. 101-510, Tit. XXIX, Pt. A, 104 Stat. 1808, as amended (10 U.S.C. 2687 note), establishes a mechanism for the "timely closure and realignment of military installations inside the United States." DBCRA § 2901(b).[1] Under the statute and its implementing regulations, once a property is recommended for closure, a screening process takes place to determine how the property will be utilized and reused. The disposal of excess military property proceeds in four stages: first, the Secretary of Defense determines whether the Department of Defense has a need for the excess property; second, if not, the Secretary determines whether any other federal agency has a need for the property; third, if no federal agency has a need for the surplus property, the Secretary determines whether the surplus property is needed for any public benefit use by a state, local, or non-profit entity; fourth, if no public use is apparent, the property may be used for private commercial uses. DBCRA § 2905(b)(5) and (7); Pet. App. 55a-57a.

The process is explained more fully by the court of appeals, see generally Pet. App. 55a-56a, but in summary: If the Secretary reaches the third stage—by determining that no military service or federal agency has a need for the property—the Secretary is required to publish in the *Federal Register* and in a local general-circulation newspaper an announcement of the surplus

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[1] For ease of reference (and consistency with the petition for a writ of certiorari and the opinions of the court of appeals and the district court), all citations to the DBCRA are to the relevant sections of the Act, as amended and codified in a note following 10 U.S.C. 2687.

property. DBCRA § 2905(b)(7)(B)(i). Public and private entities may then submit a notice of interest in the property. DBCRA § 2905(b)(7)(C)(i). As part of that process, the Local Redevelopment Authority (LRA) is required to publish in a general-circulation newspaper in the local communities a notice stating the time period during which it will receive notices of interest from "representatives of the homeless[] and other interested parties." 24 C.F.R. 586.20(c)(1); 32 C.F.R. 176.20(c)(1).[2]

The LRA prepares a comprehensive redevelopment plan for the surplus property, in which the LRA "consider[s] the interests in the use [of the property] to assist the homeless." DBCRA § 2905(b)(7)(F)(i). The plan is submitted to the Secretary of Housing and Urban Development (HUD), who evaluates it to determine, among other things, whether it appropriately balances the need for "economic redevelopment" with the "needs of the homeless." DBCRA § 2905(b)(7)(G) and (H)(i)(III). But before the LRA submits its redevelopment plan to HUD, the Secretary of Defense separately evaluates any notices of interest submitted by other interested parties (*i.e.*, those expressing an interest in using the property for a public benefit other than homeless assistance) and determines whether an applicant and its proposed use are eligible for a "public benefit conveyance." DBCRA § 2905(b)(7)(K)(v); Pet. App. 57a. When both aspects of the process are finished, the Secretary of Defense is to dispose of the remaining base property, giving "sub-

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[2] An "other interested party" is an eligible "public and non-profit entit[y] interested in obtaining property via a public benefit transfer *other than a homeless assistance conveyance* under either 40 U.S.C. § 471 *et[] seq.* or 49 U.S.C. § 47151-47153." 32 C.F.R. 176.20(c)(1)(i) (emphasis added).

stantial deference" to the LRA's redevelopment plan. DBCRA § 2905(b)(7)(K)(i) and (iii).

2. On September 8, 1995, Congress designated Fort Ritchie, Maryland, for closure under the DBCRA. Pet. App. 10a. Fort Ritchie was a "U.S. Army base located in the Catoctin mountains of western Maryland," purchased originally by Maryland in 1926 for use as a training site for its national guard. *Id.* at 57a. Pursuant to the DBCRA requirements, on May 10 and May 15, 1996, the Army published a notice in the *Federal Register* and *The Herald-Mail*, a local newspaper near Fort Ritchie, announcing that Fort Ritchie was surplus military property. 61 Fed. Reg. 21,445 (1996); *Notice of Availability of Surplus Land and Buildings in Accordance with Public Law 103-421 Located at Fort Ritchie Military Reservation, Cascade, MD*, The Herald-Mail, May 15, 1996, at C8; Pet. App. 58a. The Fort Ritchie LRA also prepared notices, entitled "Homeless Assistance Outreach Initiative," inviting the submission of notices of interest in the surplus property by providers of homeless assistance. *Id.* at 58a-60a. On May 10, 1996, the Fort Ritchie LRA, later renamed PenMar Development Corporation (PenMar), published notices in local newspapers announcing the deadline for submitting notices of interest regarding the surplus Fort Ritchie property. *Id.* at 58a. The Secretary of Defense, however, did not conduct a screening for public benefit conveyances. *Id.* at 60a.

In December 1997, PenMar submitted its redevelopment plan to HUD. Following HUD's approval, the Secretary of Defense published a "Record of Decision" that accepted the plan, thus obligating the Secretary under the DBCRA to dispose of the property in accordance with the plan. Pet. App. 60a.

3. a. Petitioner is a Maryland non-profit and tax-exempt corporation that intended to provide military-style high schools for at-risk youth in the United States and sought to acquire the Fort Ritchie property through a public benefit conveyance. Pet. App. 69a, 71a. It filed this suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, citing the failure to conduct a screening for public benefit conveyances. Pet. App. 61a. Petitioner requested declaratory and injunctive relief against the Secretary of the Army and the Secretary of Education to prevent the conveyance of Fort Ritchie to PenMar under the DBCRA. Petitioner alleged that there had been an improper screening of the Fort Ritchie property for a public benefit conveyance. *Id.* at 61a, 71a. On January 15, 2002, the district court denied petitioner's motion for a temporary restraining order and a preliminary injunction. *Id.* at 67a-93a.

b. The court of appeals reversed and remanded. Pet. App. 54a-66a. It concluded that the two notices published in local newspapers by the LRA were defective, in that they failed to fulfill the LRA's obligation to notify "other interested parties" of the deadline for submitting notices of interest in the Fort Ritchie property. *Id.* at 64a. In particular, the court of appeals held that the notices were directed only to providers of homeless assistance and did not provide adequate notice to "other interested parties," including petitioner, which the court described as "an organization devoted to establishing schools for at-risk minors." *Id.* at 63a. The court also held that, although the Army's May 15, 1996, notices fulfilled the requirements of the DBCRA, they did not also satisfy the LRA's own obligation to publish separate notices. *Id.* at 64a.

The court of appeals concluded that the LRA's failure to give proper notification to "other interested parties" contributed to the absence of any notices of interest from non-profit educational institutions (like petitioner) who might have been interested in a public benefit use for the Fort Ritchie property. Pet. App. 66a. Because the court concluded that respondents had failed to conduct a proper screening of the Fort Ritchie property for conveyance to non-profit educational institutions, it reversed and remanded with instructions that the district court enter a permanent injunction against the conveyance of Fort Ritchie until the government had remedied that procedural error. *Ibid*.

c. Pursuant to the DBCRA and the mandate of the court of appeals, the Army published remedial notices in the *Federal Register* (68 Fed. Reg. 57,436) and local newspapers in October 2003, advertising the surplus property at Fort Ritchie to "other interested parties." Pet. App. 4a. The LRA similarly published revised notices in newspapers in the vicinity of Fort Ritchie inviting notices of interest from "other interested parties." *Id*. at 47a.

Petitioner then applied to the Department of Education for a no-cost public benefit conveyance of the surplus real property for use as its school. The Department of Education eventually denied the application. Pet. App. 4a.

On October 15, 2004, respondents moved to dismiss and dissolve the injunction against conveyance, arguing that they had cured the procedural defect identified in the mandate of the court of appeals. Pet. App. 13a. The district court agreed that the revised notices to "other

interested parties" were sufficient.[3] The court declined to lift the injunction, however, because it concluded that the government had not complied with a different procedural obligation under the DBCRA—that HUD's approval of the redevelopment plan occur only *after* the screening of all interested parties seeking public benefit conveyances had been completed. *Id.* at 50a-51a. HUD had approved the redevelopment plan *prior* to the completion of the screening on remand. *Ibid.*

d. The government did not appeal at that time. Rather, in response to the decision, PenMar sent HUD a revised Fort Ritchie Comprehensive Redevelopment Plan in June 2005. HUD approved the revised plan. Pet. App. 5a.

In November 2005, respondents filed a second motion to dismiss, alleging that the defect identified by the district court had been cured. Before the district court ruled on that motion, petitioner filed an amended complaint raising additional claims. Among other things, petitioner—which previously claimed to be an "other interested party" entitled to consideration for a "public benefit conveyance," and thus secured a remand to remedy the failure to screen for public benefit uses—now claimed to be a provider of homeless assistance. Petitioner alleged that the government had violated the statute by failing to *re*-screen for homeless providers *at the same time* it screened for "other interested parties" pursuant to the court of appeals' decision. Pet. App. 5a.

On September 28, 2006, the district court granted respondents' motion to dismiss, holding that petitioner lacks standing to bring the new claim under the DBCRA

[3] The district court also stated that it understood the court of appeals to have held that the earlier notice to homeless-assistance providers was adequate. Pet. App. 39a.

because it "is not a homeless provider" and because it had not been injured by the failure to conduct a rescreening for public benefit conveyances at the same time as a rescreening for homeless providers. Pet. App. 18a-20a & n.4. (The district court also found that petitioner lacks standing to bring claims under other statutes. *Id.* at 21a-25a.) The court dissolved the injunction, thereby permitting the conveyance of Fort Ritchie to PenMar.

e. The court of appeals unanimously affirmed. Pet. App. 1a-7a. The court observed that whether petitioner is "a homeless provider" was "beside the point," in light of its own earlier remand for implementation of a limited remedy. *Id.* at 6a. Noting that petitioner had sued to challenge the failure to give notice for "other interested parties" and that the court of appeals' earlier decision had concerned petitioner's claim for a public benefit conveyance, the court stated that it had "made clear that we were remanding only for the rescreening of other interested parties." *Ibid.* Thus, the "mandate rule" limited the district court to ordering a rescreening for "other interested parties" and barred it from ordering a rescreening for homeless providers. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or this Court. Accordingly, further review is not warranted.

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[4] The court of appeals also rejected petitioner's claim under the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, holding that petitioner, which sought to use the property for an education facility, was outside the zone of interests protected by that statute. Pet. App. 7a.

1. The court of appeals affirmed the dismissal of the complaint on the ground that its mandate in the earlier appeal directed the district court to enjoin transfer of the property until there had been a screening for "other interested parties," not for homeless providers: "Our opinion made clear that we were remanding only for the rescreening of other interested parties." Pet. App. 6a. As the court explained:

> In our earlier opinion, we noted that [petitioner] filed suit "[c]laiming that it was entitled to a public benefit conveyance screening regarding the Fort Ritchie property" because [respondents] did not screen for "other interested parties." [Pet. App. 61a]. We explained, "[i]f the Secretary of Defense determines that an 'other interested' applicant meets the eligibility standards . . . the Secretary effects a 'public benefit conveyance' of the requested property to that party," *id.* at [57a], and concluded that the failure to publish notice for other interested parties "prevented [petitioner] from triggering a public benefit conveyance screening." *Id.* at [66a].

Pet. App. 6a.

The court of appeals correctly interpreted the mandate of its earlier decision. That is unsurprising. "[T]he court that issues a mandate is normally the best judge of its content," although that interpretation does not strictly bind this Court. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940).

2. Indeed, petitioner does not even try to dispute the scope of the mandate. Rather, petitioner asserts that the courts below erred in allowing the earlier mandate to preclude consideration of what petitioner alleges are *new* issues raised in its amended complaint. Pet. 22-28.

But petitioner's only new issue is its new claim that it actually is a homeless provider with the right to demand a *simultaneous re*screening for homeless providers *in addition to* the rescreening for "other interested parties" that the court of appeals ordered in its earlier decision.

The court of appeals was not required to address that issue in the current appeal.[5] Petitioner had litigated this case for several years on the theory that it was an "other interested party" that had been left out of the original notices and screenings, which the courts determined had been directed only to providers of homeless assistance. Pet. App. 63a (court of appeals' reference to the screening notice's "message that the LRA's exclusive interest was in proposals to help the homeless"); see *id.* at 39a (district court's interpretation of court of appeals' first decision "as holding that the defendants' notice to homeless providers was adequate"). The court of appeals did not have to reopen the predicate for the first appeal and remand, shared by all in this litigation, that the initial notice to—and screening for—homeless providers was unassailable. Nor was the court of appeals' refusal to reopen the issue a denial of due process to petitioner. See Pet. 27-28.[6]

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[5] To the extent petitioner claims that the court of appeals' decision was inconsistent with petitioner's unfettered right to amend its complaint to add new claims (Pet. 25-26), the court of appeals did not address Rule 15 of the Federal Rules of Civil Procedure. Thus, even if the court erred, petitioner could request only case-specific error correction rather than resolution of any split in the circuits about how Rule 15 should apply after a remand.

[6] Petitioner suggests (Pet. 24) that the result in this case conflicts with the Fifth Circuit's decision in *United States* v. *Lee*, 358 F.3d 315 (2004), which noted that the mandate rule used for resentencing in

Petitioner's new claim turns on its assertion (Pet. 3, 17, 20, 29, 30) that the DBCRA requires the public benefit screening to occur *at the same time* as the screening for homeless providers, notwithstanding the fact that the two screenings are done by different agencies. Even assuming that is an accurate construction of the statute in the abstract, that would not mean that it is the only way to implement the statutory scheme in light of a judicial remand to remedy certain mistakes in administrative procedure. See Pet. App. 66a. Remands in the administrative-law context may contemplate discrete fixes tailored to the relevant error, without requiring the agency to rerun all parts of its decision making process from the beginning. See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939) ("If [agency] findings are lacking which may properly be made upon the evidence already received, the court['s remand] does not require the evidence to be reheard.").

Moreover, neither the district court nor the court of appeals addressed whether the screenings under the DBCRA must be simultaneous (either in the abstract or

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criminal cases does not preclude the consideration of an issue on remand that "could *not* have been raised in the initial appeal." *Id.* at 323. But the "new" issue in *Lee* (whether to grant a discretionary upward departure) went unaddressed in the first appeal only because it was not appealable, not because the government had failed to raise it until after the remand. See *id.* at 324. Here, petitioner did not raise the simultaneous-screening issue before (or during) the first appeal. Moreover, doing so would not have required petitioner to address "every possible contingency" that could affect the rest of the case. Pet. 24 (quoting *Lee*, 358 F.3d at 324). It would only have required petitioner to know that it wanted to be considered a provider of homeless assistance—a desire that would have been inconsistent with its original lawsuit and appeal, which were based on the very proposition that a notice addressed to homeless providers did not serve as adequate notice to petitioner.

as part of a judicially ordered remedy), and petitioner does not suggest that there is any conflict in the lower courts on that question. In addition, that question would not even need to be addressed in this case unless the district court's standing decision were reversed.

3. In any event, whether the court of appeals was correct in its interpretation of its own mandate does not warrant this Court's exercise of its certiorari jurisdiction. This case presents no question of broad applicability. To the contrary, the petition offers only a fact-based inquiry that would turn on an analysis of the specific history of this litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
ANTHONY J. STEINMEYER
EDWARD HIMMELFARB
Attorneys

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