Case No. 16-56255

IN THE 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.

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF DEFENDANTS AND IN SUPPORT OF REVERSAL

On Appeal from the United States District Court
for the Central District of California
The Honorable Philip S. Gutierrez, Presiding Judge
Case No. CV 14-03242 PSG (PJWx)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the League of California Cities and the California Chapter of the American Planning Association aver that they are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporation.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The League of California Cities (League) is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance.

The Committee has identified this case as having such significance because the district court's analysis, if adopted by this Court, would expand cities' liability for regulatory takings beyond constitutional bounds and threaten their land use and zoning regulatory powers. The exercise of police powers by local legislatures in the sphere of land use regulation is ordinarily subject only to exceedingly deferential rational basis review—and for good reason, since local planning and policymaking are best left to democratically accountable local legislatures, not the federal courts. Yet cities must pay just compensation when they take private property for public use. In order to reconcile these two principles, courts should only rarely find that private property has been taken through regulation—indeed, the Supreme Court has admonished that a regulatory taking only occurs when the regulation is functionally equivalent to wholesale appropriation of the regulated property.

The California Chapter of the American Planning Association, the largest of the 47 chapters of the American Planning Association, is an organization of close to 5,000 professional planners, planning commissioners, elected officials, and informed citizens, whose mission is to foster better planning by providing vision and leadership in addressing important planning issues. To that end, the Chapter's

Amicus Curiae Committee, made up experienced planners and land use attorneys, monitors litigation of concern to California planners and participates in cases of statewide or national significance that raise issues affecting land use planning in California. Although nominally about mobilehome rent control, the significance of this case extends much farther in ways that could subject municipalities to takings challenges to a wide variety of land use and development regulations. In so doing, the opinion, unless reversed, is likely to substantially increase lawsuits filed again local governments and associated litigation costs with a resultant chilling effect on their exercise of police power to protect public welfare well beyond the issue at hand.

The decision below holds that denying a landlord rent increases for debt service "takes" its property, despite the fact that mobilehome rent control laws—and allowing rent increases only for increased operating expenses rather than for debt service—are commonplace in California. This holding flouts the principle that municipalities have wide latitude to regulate land uses and the landlord-tenant relationship and are not required to pay compensation to private property owners regulations unless the impact a regulation is so great as to be equivalent to a physical occupation of the property. The decision below is wrong as a matter of law, and this Court should correct the district court's error and hold that no taking occurred here.

Moreover, the district court in this case should never have sent the regulatory takings question to the jury. The question here was inherently and predominantly a legal question, not the kind of question within the special competence of juries, and the district court compounded its error of law by erroneously and incompletely charging the jury. Rather than informing the jury of the bedrock principle that a regulatory taking only occurs when regulation is

comparable to direct appropriation in nature or magnitude, and rather than instructing the jury that cities have considerable latitude in regulating mobilehome park rents, the district court instead offered the jury an untethered policy question. In essence it charged the jury with determining whether "justice and fairness" required the City of Carson (Carson) to compensate Colony Cove Properties LLC (Colony Cove) for the economic impact of its denial of the full increases sought by Colony Cove, implying that a disproportionate regulatory impact on Colony Cove could amount to a taking. That is an incorrect statement of the law. "Justice and fairness" is not a freestanding regulatory takings test, and asking the jury to determine the fairness of Carson's rent increase decision invaded the province of local policymakers.

Because it grievously misconstrues takings law, and jeopardizes the ability of California's cities to engage in appropriate and reasonable local policymaking, the decision below should be reversed.

All parties have consented to the filing of this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party's counsel authored this brief in whole or in part. No outside person or entity contributed funding for the brief.

ARGUMENT

I. The District Court Erred In This Case By Submitting The Takings Question To The Jury And By Offering The Jury Misleading Guidance On That Question.

A. Takings Jurisprudence Is A Narrow And Bounded Exception To The Principle That Economic Policy Is Set In Legislatures, Not In Courts.

Democracy derives its legitimacy from representation, and accordingly democracy demands that policy choices are made by representatives of the people. *See, e.g., Nat'l Federation of Ind. Businesses v. Sebelius*, 567 U.S. 519, --, 132

S. Ct. 2566, 2600 (2012). While courts may review laws enacting economic and social policies, for the most part this review is limited and deferential. Under the Equal Protection Clause, for instance, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed. Comms. Comm'n v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993). Similarly, under the substantive aspect of the Due Process Clause, economic legislation fails judicial scrutiny only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926). The purpose of this judicial restraint is to ensure that jurisprudence is not "subtly transformed into the policy preferences" of the judicial branch but instead remains under the control of democratically elected representatives, and thus accountable to the will of the people. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (substantive due process case).

This principle applies with full force in the land use and zoning context. *See, e.g., Village of Euclid*, 272 U.S. at 395; *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). It also applies to rent control, and it compels courts to uphold price controls on residential apartment units and on mobile homes because it is reasonable to believe that they will advance the public interest in protecting their residents' welfare. *See, e.g., Pennell v City of San Jose*, 485 U.S 1, 13 (1988) (apartment rent control rationally serves public interest in tenant welfare); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991) (rejecting due process and equal protection challenges to rent control ordinances); *Levald, Inc. v. City of*

Palm Desert, 998 F.2d 680, 690 (9th Cir. 1993) (rejecting substantive due process challenge to mobilehome rent control ordinance).

The Takings Clause of the Fifth Amendment, which forbids the government from taking private property for public use without just compensation, is an exception to this otherwise pervasive principle of judicial deference in the economic sphere—but it only applies in rare and extreme circumstances. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Beginning in 1922, the Supreme Court recognized that a taking of private property might also occur where government regulation is "so onerous that its effect is tantamount to a direct appropriation." *Id.* at 537-38 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). In *Penn Central Transportation Co. v. New York City*, the Court articulated a multifactor test for determining when a regulation takes private property; this test looks to the economic impact of the regulation, the extent to which the regulation has interfered with objectively reasonable investment-backed expectations, and the character of the government action (such as whether it resembles a physical invasion of property). 438 U.S. 104, 124 (1978).

Throughout the *Penn Central* multifactor inquiry, courts must be mindful of the "touchstone" of regulatory takings jurisprudence: it aims "to identify regulatory actions 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. Only the most severe regulatory curtailment of private property rights will justify a finding that a taking has occurred, since "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

Mahon, 260 U.S. at 413. If takings jurisprudence were not kept within its proper bounds, it would swallow the rule that economic legislation is left to democratic control and is subject only to rational basis review. An expansive understanding of regulatory takings would tie the hands of democratically elected representatives just as surely as by declaring the existence of new fundamental rights or new protected classes without firm grounding in the Constitution.

B. Carson's Application Of Its Rent Control Ordinance To Colony Cove Was Not A Regulatory Taking, And The Jury Never Should Have Been Asked To Decide This Question.

The district court in this case disregarded the bedrock precept that takings jurisprudence requires compensation only for regulatory incursions that are tantamount to a physical invasion. Proper application of those principles would have compelled the result that Carson did not take Colony Cove's property by limiting its rent increases in the two years at issue and by applying a methodology for calculating rent increases that looked only to net operating costs and revenues and not to the cost of debt service. As Carson persuasively demonstrates, Colony Cove failed in this case to prove that its losses as a result of Carson's rent-increase decisions were so severe that they were comparable to a physical invasion of its property, that Colony Cove had a reasonable expectation that it would obtain the rent increases it sought, and that the nature of Carson's regulatory action resembled a physical appropriation. *See* Appellants' Br. 31-47. Accordingly, the court should have entered judgment in Carson's favor as a matter of law.

Moreover, even assuming that there was a triable issue in this case as to whether Carson's rent-increase decisions amounted to a regulatory taking, the district court erred in submitting this question to a jury rather than deciding it for itself. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court held that the Seventh Amendment guarantees a jury trial in damages actions

brought under 42 U.S.C. § 1983, *see* 526 U.S. 687, 709 (1999), and that there is no per se exception to this guarantee for takings claims, *id.* at 715-18. But the Court did not find a right to a jury trial in all takings claims seeking just compensation. Instead, only those issues that are "predominantly factual" are "allocated to the jury." *Id.* at 720. By contrast, the court remains the arbiter of issues that are predominantly legal.

Del Monte Dunes itself illustrates the rule. In that case, two issues were tried: whether the landowner was deprived of all economically viable use of the property, and whether the city defendant's land use decision substantially advanced its legitimate public interest.[1] 526 U.S. at 720-21. As for the first issue, the Supreme Court had no difficulty in holding that "the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question" and therefore must be submitted to the jury. *Id.* at 720. But it noted a "closer question" as to whether a jury should decide whether the land use restriction advanced the government's interest, in light of the legal aspect of this inquiry. *Id.* at 721. Rather than crafting a categorical rule, the Court decided the question only "[i]n this case." *Id.*; *see also Buckles v. King Cty.*, 191 F.3d 1127, 1140 (9th Cir. 1999) (*Del Monte Dunes* "does not establish a right to a jury on every takings claim"). The Supreme Court held that where the city denied a development proposal after taking a series of conflicting positions about the proposal over a period of years, the question whether the city's decision to reject a particular development was arbitrary, "in light of the context and protracted

[1] This latter theory of regulatory takings, that a taking can occur when a government regulation does not substantially advance legitimate public interests, was subsequently overruled as a valid takings theory. *Lingle*, 544 U.S. at 545.

history" between the city and the developer, was a "narrow, fact-bound question" that was properly submitted to the jury. *Id.* at 706, 721.

In Colony Cove's case, by contrast, no "narrow fact-bound" question was posed to the jury. Instead, the jury was asked to decide a broad, inchoate question of "justice and fairness." ER 102. (Moreover, as discussed in further detail in Section I.C., below, while the district court in *Del Monte Dunes* offered the jury considerable guidance about the proper scope of the city's land use discretion, 526 U.S. at 700-02, the court in this case offered no such guidance.) Accordingly, the fact that regulatory takings questions were submitted to a jury in *Del Monte Dunes* offers no support for the district court's decision to submit the regulatory takings inquiry to the jury here; to the contrary, *Del Monte Dunes* supports Carson's argument that the legal nature of the questions presented here compelled reserving these questions for the judge.

Nor does the district court's decision to send the question to the jury find support in other cases. While there are a handful of district court cases submitting takings questions to juries, those few cases in this circuit and elsewhere that have done so are largely distinguishable because they present narrow questions of the kind the Supreme Court approved in *Del Monte Dunes*. For instance, in *David Hill Development, LLC v. City of Forest Grove*, a case that Colony Cove relies on, the regulatory takings issue turned on whether a city had forced a developer to bear an "extraordinary" delay in obtaining a permit, "how long the process should have taken," "whether [the city] acted in bad faith, and the economic impact to [the developer] from the delay." No. 3:08-CV-266-AC, 2012 WL 5381555w, at *17-*18 (D. Or. Oct. 30, 2012). These questions are far narrower and more factual than the "justice and fairness" question the jury was asked here. Similarly, in *Town of Nags Head v. Toloczko*, the regulatory takings issue turned on whether a

two-year delay in issuing repair permits was a normal or extraordinary delay and whether the city's actions caused a loss in value. No. 2:11-CV-1-D, 2014 WL 4219516, at *17-*18 (E.D.N.C. Aug. 18, 2014). And in *Vulcan Materials v. City of Tehuacana*, the Fifth Circuit addressed a takings question that turned on whether limestone quarry operations were a nuisance at common law, and thus could be completely prohibited without effecting a taking. 369 F.3d 882 (5th Cir. 2004). The court determined that whether a nuisance existed was a question for the jury, but it did not remand the takings question for resolution by the jury. Rather, it specified that a jury should decide the narrower question "whether [the plaintiff's] proposed operation of the quarry on [specified property] constitutes a nuisance under Texas law." *Id.* at 896.

By contrast, the district court in *Doctor John's, Inc. v. City of Sioux City* bifurcated liability and damages issues when it determined the constitutionality of a city's zoning ordinance regulating the location of adult entertainment businesses, reserving liability for a bench trial over the defendant city's objection. 467 F. Supp. 2d 925, 927 (N.D. Iowa 2006). The court read *Del Monte Dunes* closely and held that the plaintiff's "broad challenge to the constitutionality" of the zoning ordinance was not the kind of factual issue that *Del Monte Dunes* reserved to the jury.

In this case, some factual questions may have been appropriate for jury resolution, such as if the parties had presented conflicting expert evidence about the value of Colony Cove's mobilehome park before and after Carson's decision concerning the rent increase requests at issue. *Cf. Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002) (reserving for the jury the factual question about what uses of land remained after regulatory action). But the broad and inherently legal question of whether a regulation goes "too far," and is therefore

tantamount to a physical invasion of property, is not appropriate for resolution by a jury. Indeed, the Supreme Court has acknowledged that its test is "ad hoc," *Penn Central*, 438 U.S. at 124, and that "vexing subsidiary questions" have arisen as to the *Penn Central* factors, *Lingle*, 544 U.S. at 539. In *Del Monte Dunes*, the Supreme Court was careful to note that the jury was presented with a specific question about the relationship between the city's land use policies and its decisions with respect to a particular development, not "whether the city's zoning ordinances or policies were unreasonable." 526 U.S. at 704. The same cannot be said here.

C. The District Court's Error In Submitting The Regulatory Takings Question To The Jury Was Compounded By Its Erroneous And Incomplete Instructions.

Even if it were appropriate to ask the jury whether a regulatory taking occurred, this Court can have no confidence that the jury received the tools it needed to arrive at a reasonable answer to that question, because the district court instructed the jury with an incorrect statement of the law—that a taking may be found where one person is asked to bear a burden that "justice and fairness" requires to be borne by all—and with incomplete instruction about issues such as how Colony Cove was required to demonstrate economic impact and how the jury should evaluate the character of Carson's regulation of Colony Cove's rent increases.

"Jury instructions must be supported by the evidence, fairly and adequately cover the issues presented, correctly state the law, and not be misleading." *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014). While the district court has discretion in formulating instructions in a particular case, there is no discretion to misstate the law. Accordingly, this Court "review[s] de novo whether the instructions misstated the law, and review[s] the formulation of the instructions for

abuse of discretion." *Fireman's Fund Ins. Companies v. Alaskan Pride P'ship*, 106 F.3d 1465, 1469 (9th Cir. 1997) (internal citations omitted).

As Carson aptly notes in its opening brief, the jury was given inadequate instructions because the district court listed the *Penn Central* factors without explanation, except to note that the investment-backed expectations test must be analyzed from the viewpoint of an objectively reasonable investor. Appellants' Br. 54-58. For instance, the jury was told that one of the factors it should consider was the "character of the governmental action," ER 102, but it was never told what that means. Specifically, it was never told that rent control and limits on rent increases have repeatedly been held to weigh *against* finding a taking because they are an adjustment of existing benefits and burdens of the landlord-tenant relationship and bear no resemblance to a physical invasion of property. *See, e.g., MHC Fin. Ltd. P'Ship*, 714 F.3d 1118, 1128 (9th Cir. 2013); *see also* Appellant's Br. 56. The sparse instruction given here on the regulatory takings question stands in sharp contrast to the jury instructions the Supreme Court approved in *Del Monte Dunes*, which provided background about the scope of the city's power and explained the test the jury was asked to apply. 526 U.S. at 700-01.

The instructions in this case were defective for an additional reason as well: they misstated the law. The court's instructions told the jury that, to prove a taking, Colony Cove must show that "justice and fairness require that the economic injuries caused by Defendants be compensated by the government, rather than remain concentrated on the Plaintiff." ER 102. And the court informed the jury that the animating guidepost of their task was fairness and proportionality: "In general, 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." *Id.* In other words, the district court

informed the jury that its task in applying the *Penn Central* factors was to determine whether Carson unfairly singled out a landlord to bear a disproportionate burden.

This was an incorrect statement of the law. The "fairness" language that the district court relied on is merely a general description of the purposes underlying the takings clause. This language first appeared in *Armstrong v. United States*, which held that the total destruction of the value of materialmen's liens through government action was a taking. 364 U.S. 40, 49 (1960) (stating that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). But nothing in *Armstrong* turned on a comparison of the burdens that material providers were forced to bear to anyone else's benefits or burdens; instead *Armstrong* focused on the fact that the entire value of the liens was destroyed by government action. *Id.* at 48 ("Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none."). Rather than stating an operative test for a taking, *Armstrong*'s fairness language is descriptive, and describes the motivation behind the Takings Clause: it is unfair to take private property without compensation, no matter whether it is for public purposes or not. But *Armstrong*'s fairness language tells us nothing about whether a taking has occurred or not.

Since *Armstrong*, the Supreme Court has repeatedly quoted and cited the fairness language as an animating principle of the Takings Clause. *See, e.g.*, *Lingle*, 544 U.S. 537; *Penn Central*, 438 U.S. at 123. But it has never used the language as an independent test for whether a taking has occurred. *See* Michael Pappas, "The *Armstrong* Evolution," 76 Md. L. Rev. Endnotes 35 (2016) ("despite the Court's announced allegiance to a comparative measure of takings embodied by

the *Armstrong* principle, the Court does not actually resolve takings cases on these grounds"). Indeed, in *Del Monte Dunes*, the Court specifically rejected using *Armstrong* proportionality concerns in a regulatory takings case:

> Although in a general sense concerns for proportionality animate the Takings Clause, see *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"), we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. See *Dolan [v. City of Tigard*, 512 U.S. 374,] 385 [(1994)]; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

Del Monte Dunes, 526 U.S. at 702-03 (parallel citations omitted).

Accordingly, not only was the district court's invocation of fairness and justice so vague as to leave the jury with no meaningful tools to assess Carson's rent-increase decisions, but it was also an erroneous statement of regulatory takings law. The Takings Clause does not provide courts or juries with a warrant to engage in open-ended and abstract inquiries about the validity of local law, or to strike down local enactments on the basis of a vague sense of fairness. Valid land use regulations will sometimes fall heavily on particular property owners; that does not turn them into a taking. *See*, *e.g.*, *Hadacheck*, 239 U.S. at 410 (The police power "may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily"); *Penn Central*, 438 U.S. at 140-41, (Rehnquist, J., dissenting) (arguing in dissent that New York City's landmarks law should be declared invalid because it imposed millions of dollars in preservation costs on owners of historic properties and its benefits were diffuse). To permit a court or a jury to require the government to pay compensation on the basis of inchoate fairness or

proportionality concerns "would empower—and might often require—courts to substitute their … judgments for those of elected legislatures and expert agencies." *Lingle*, 544 U.S. 544. This Court should reject such an undertaking.

CONCLUSION

For the reasons offered above, *amici curiae* respectfully submit that this Court should reverse the decision below.

Dated: March 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,198 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 15, 2017.

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CERTIFICATE OF SERVICE

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on March 15, 2017.

BRIEF OF *AMICI CURIAE*
LEAGUE OF CALIFORNIA CITIES AND THE
CALIFORNIA CHAPTER OF THE
AMERICAN PLANNING ASSOCIATION
IN SUPPORT OF DEFENDANTS AND IN
SUPPORT OF REVERSAL

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Executed March 15, 2017, at San Francisco, California.

/s/Pamela Cheeseborough
Pamela Cheeseborough