No. 06-56306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM AND MAUREEN H. PIERCE,

Plaintiffs-Appellants,

versus

CITY OF GOLETA, et al.,

Defendants-Appellees.

Appeal From the United States District Court
for the Central District of California, Los Angeles
District Court Case No. CV 02-02478 FMC (RZx)

BRIEF OF *AMICUS CURIAE* GOLDEN STATE MANUFACTURED-HOME OWNERS LEAGUE IN SUPPORT OF DEFENDANT-APPELLEES CITY OF GOLETA, ET AL. ON REHEARING EN BANC

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

The Golden State Manufactured-Home Owners League, Inc. ("GSMOL") has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Dated: April 16, 2010

COOLEY GODWARD KRONISH LLP

By: /s/ Gordon C. Atkinson
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Attorneys for GOLDEN STATE MANUFACTURED-HOME OWNERS LEAGUE

I. INTERESTS OF *AMICUS CURIAE*

The Golden State Manufactured-Home Owners League ("GSMOL") was formed in 1962 as a group dedicated to protecting the investments owners of manufactured homes make in their homes. GSMOL seeks to present the Court with additional viewpoints and information from homeowners who, although not parties to the present dispute, would be dramatically affected if the City of Goleta's mobilehome rent control ordinance (the "Ordinance") is struck down. A finding in favor of the plaintiffs-appellants (the "Park Owners") will undoubtedly lead to litigation against virtually all of the approximately 100 California jurisdictions with mobilehome rent control laws and, given the desperate financial conditions facing municipalities, will likely lead to the statewide elimination of these well-established protections. Such a result will be followed in turn by skyrocketing rents, and the loss of virtually all investment manufactured-home owners have in their homes.

II. SUMMARY OF ARGUMENT

Because they do not own the land on which their homes are (*de facto* permanently) located, manufactured-home owners are subject to a severe risk of economic exploitation by the owners of the land underlying mobilehome communities. This risk, which is unique to this type of shared ownership, results in an economic imbalance of power that, unchecked, would allow the land owner

to seize all or part of the value in the home by raising rents so high that the homeowner is unable to sell the home for more than a pittance.

For over thirty years, a growing number of what is now over 100 California cities and counties have protected manufactured-home owners from such economic oppression through the type of rent control law challenged in this case. California courts have consistently recognized the legislative branch's power to enact these laws as valid economic regulations and this Court's decisions generally have also supported these ordinances.

The arguments of the Park Owners are contrary to a vast body of takings cases and represent a fundamental misapplication of the *Penn Central* doctrine with respect to price controls. This Court must not accept the Park Owners' *political* view that vacancy control laws (i.e., regulations which limit rent increases at the time a manufactured home is sold within the park) do not make housing more affordable; this view is simply irrelevant to the *Penn Central* analysis.

Reversal of the district court's decision would have a stark and immediate effect on manufactured-home owners in Goleta, essentially stripping them of all protection against the landlord capturing all of the equity in their homes. The ramifications of the decision, however, go well beyond Goleta; across the State, well-financed landowners will increase the pace of litigation against cities with similar laws, potentially resulting in the eradication of these ubiquitous protections

for manufactured-home owners. This Court, therefore, should avoid such a dramatic result and affirm the decision of the district court holding that the Ordinance is constitutional.

III. ARGUMENT

A. Manufactured-Home Owners Face Unique Risks Justifying Unique Legal Protections

The term "mobilehome" is deceptive because, as a practical matter, once a manufactured home is installed, it is rarely moved again. As the Supreme Court has explained:

> 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. . . .[O]nly about 1 in every 100 mobile homes is ever moved. . . . A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Yee v. City of Escondido, 503 U.S. 519, 523 (1992). Additionally, most mobilehome parks in California prohibit the installation of used homes; therefore even if a home can be moved, there is often nowhere to relocate it.

Because a manufactured home is typically sold in place, the sales price for the home can be affected by the rent charged for the underlying land. With rent

controls, the value of a manufactured home may increase, in part due to the security incoming residents achieve from controlled rents: this is the basis for the Park Owners' "premium" theory. The "premium" works both ways, however.

Without rent controls, because the homes are immobile, the homeowners are held hostage to an unregulated landlord's whim: if rents increase, homeowners either must pay the increases or try to sell the mobilehome in place. Uncontrolled, a park owner can raise the rent on resale so high that the homeowner is unable to sell the home for more than a minimal amount, leading to abandonment of the mobilehomes or their fire sale. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993) (discussing problem). Compounding this problem is the fact that, during their residencies, manufactured-home owners invest far more in their homes than their park owner landlords invest (on a per space basis) in the land and park improvements – investments that will be wholly lost by the homeowners. *See* K. Baar, *The Right To Sell the "Im"mobile Manufactured Home in Its Rent Controlled Space in the "Im"mobile Home Park: Valid Regulation or Unconstitutional Taking?*, 24 Urban Lawyer 157, 219 (1992). These risks are not faced by other "renters," such as apartment dwellers, who rarely invest significant amounts in the spaces they rent and can more readily move from one space to another. Most jurisdictions have in fact confined their protective rent regulations to apply only to manufactured-home communities.

The Park Owners, unsurprisingly, take the view that only *they* should gain from a rising housing market. This premise underlies arguments that a manufactured home has a discrete value that can be compared to the sales price to calculate a "premium." Such a view fails to recognize that manufactured houses are *homes*. As explained by a commonly used mobilehome appraisal guide, the ability to gain equity is essential to the functioning of the manufactured housing market:

> Today's manufactured home is a true dwelling. . . . At less than half the price of a conventional house of the same square footage, the manufactured home will certainly attract an ever growing share of the home buying market. This market demands and deserves a realistic value-system. It requires a system which permits the accumulation of equity, for equity is basic to the concept of home ownership.

National Appraisal System Field Instruction Manual 107 (National Appraisal Guides, Inc. 5th rev. 1999).

The courts cannot simply deny homeowners all potential for equity by deciding that only the land deserves to gain in value. As the court explained in *Adamson Companies v. City of Malibu*, 854 F. Supp. 1476 (C.D. Cal. 1994), the windfall/premium debate is a political one concerning an inherently *shared* asset. *Id.* at 1489, 1493, 1502. While a legislature may *choose* to allow the landowner to capture the value of a rising housing market at the homeowner's expense or vice

versa, it would not be proper this Court to do so, especially where such a decision would be in conflict with the legislature's choice.

B. Rent and Vacancy Controls Are Well Accepted Methods of Protecting Manufactured-Home Owners

The concept of rent control can be a political hot button, and some economists think it to be unworkable or counterproductive. The federal courts, however, recognizing their proper role in our democracy, have routinely upheld rent control ordinances, noting that legislatures are allowed to disagree with economists in seeking to protect their vulnerable citizens. On three occasions since 1986, the Supreme Court has rejected economic theory-based challenges to the validity of rent controls.[1] *Yee*, 503 U.S. 519; *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986). In so doing, the Court has observed that *all* rent controls result in a transfer of wealth from landlords to tenants; the transfer is simply more visible in the mobilehome vacancy control context. *Yee*, 503 U.S. at 529-30.

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[1] As this Court held in *Schnuck v. City of Santa Monica*, 935 F.2d 171 (9th Cir. 1991) (upholding similar law), "[t]hat rent control may unduly disadvantage others . . . are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law." *Id.* at 175; *see also Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1358 (1990), *aff'd*, 503 U.S. 519 (1992) ("As we read the opinions of the United States Supreme Court and lower federal and state courts, the decision whether to use rent control as a tool to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts.").

Over 100 California jurisdictions have enacted rent and vacancy control laws designed to protect manufactured-home owners from the unequal bargaining power and potential oppression discussed above. Those regulations have been uniformly upheld by the California courts, which recognize that state law protects homeowners' equity investment in their manufactured homes. *See Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal.3d 184 (1983); *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.*, 70 Cal. App. 4th 281 (1999); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.*, 30 Cal. App. 4th 84 (1994); *Sandpiper Mobile Village v. City of Carpinteria*, 10 Cal. App. 4th 542 (1992).[2]

Most of the cases published by this Circuit have likewise affirmed these regulations or declined to hear challenges to them brought in the federal, not state, courts. *See, e.g.*, *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548

[2] Although not binding on this Court, state court cases are critical to the application of takings law. First, the underlying property rights in question are created by state law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The State of California's recognition that manufactured-home owners have equity and investment rights in their mobilehomes thus cannot be ignored in analyzing these issues.

Additionally, state courts are the primary arbiters of land use law, *including* federal takings cases. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346-47 (2005). This is not a result of federal courts closing their eyes to the issue, but rather a function of the proper respective roles of the state and federal courts. *Id*. at 347.

F.3d 1184 (9th Cir. 2008); *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046 (9th Cir. 2004); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994); *Levald, Inc.*, 998 F.2d 680. On two prior occasions, however, panels of this Court have swum against the tide and held similar vacancy control laws to be takings under various theories. Each time, the Supreme Court has rejected the panel's analysis.

In *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986), a panel of this Court concluded that the premium potentially created by a mobilehome rent ordinance converted the rent regulations into a physical taking of the park owner's property. *Id*. at 1279-80. *En banc* review was denied, over the dissent of Judges Schroeder, Nelson and Norris who argued that the law was constitutional. *Id*. at 1282-84 (Schroeder, J., dissenting).

The *Hall* decision failed to recognize that the mobilehome rent control premium was not in fact a loss to the park owner, but simply a redistribution of the benefits and burdens resulting from a permissible land use regulation. On this basis, several California appellate courts took the unusual step of expressly rejecting *Hall's* constitutional takings conclusions. *See Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 54 (1991); *Yee*, 224 Cal. App. 3d at 1353-57. The views of these state courts were adopted by the Supreme Court when it affirmed the *Yee* decision, holding that vacancy control is *not* a physical taking. *Yee*, 503 U.S. at

529-30. Although the Court did not reach a regulatory taking analysis, it notably suggested such analysis was principally *a question for the state courts*: "We leave the regulatory taking issue for the California courts to address in the first instance." *Id*. at 538. As noted, California courts have uniformly held that these laws do *not* constitute a regulatory taking. *See, e.g.*, *Carson Mobilehome Park Owners' Ass'n*, 35 Cal.3d at 195.

This Court's second detour came in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), where it held that the mere existence of a premium meant that "[t]he Ordinance does not substantially further the City's interests" despite express trial court findings that it did. *Id.* at 899. Again the panel was split. *Id.* at 900-06 (Fletcher, J., dissenting). After the Supreme Court rejected the entire "substantially advances" test developed by this Circuit as having "no proper place in our takings jurisprudence," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005), however, the Court later reversed itself, affirming the constitutionality of the same type of law at issue here. *Cashman v. City of Cotati*, 415 F.3d 1027 (9th Cir. 2005). *Lingle* provided a clear direction to the lower courts that takings law does *not* permit heightened scrutiny of economic legislation any more than other constitutional challenges. *Lingle*, 544U.S. at 544-45. *Lingle* also emphasized that premium-based arguments, which do not focus on the effect of the law on the landowner, are *not* proper takings tests. *Id*. at 542-44.

The result urged by the Park Owners here would bring us back to the same place as the earlier missteps in *Hall* and *Cashman* – the erroneous conclusion that mobilehome rent control laws that do not prevent the price of mobilehomes from rising are somehow a taking *from a landowner who paid for regulated land*. While this time dressed up as a *Penn Central* challenge, the Park Owners ask this Court, unjustifiably, to reject these deeply ingrained laws. The Court, however, should not depart from well-established takings law, and should instead affirm the decision of the district court.

C. The Ordinance Is Not a Taking Under *Penn Central*

The *Penn Central* test may be *ad hoc*, but it is not standardless. The *Penn Central* test requires the Court to evaluate a regulation by considering three primary factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) the "character of the governmental action." *Lingle*, 544 U.S. at 538-39.

Cases finding a *Penn Central* taking are exceedingly rare, involving what the Supreme Court has described as "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). The *Penn Central* test is not designed to allow federal judges to strike down economic regulations they believe are unfair or "go too far"; it is designed to "identify regulatory actions that

are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 127 (1st Cir. 2009) (citing *Lingle*, 544 U.S. at 539); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009) ("*Penn Central* . . . is likewise focused on identifying situations that approximate traditional physical takings.").

There is nothing "extreme" about rent control laws that have been in place for decades in over 100 California jurisdictions. The Park Owners, however, urge a result that would depart from longstanding *Penn Central* case law, striking down (for the first time we could find) a rent control law that *permits* a fair rate of return. A proper analysis of the *Penn Central* factors compels affirmance of the district court's entry of judgment for the City on this claim.

1. The "Economic Impact" of the Ordinance Does Not Support a Taking Because the Park Owners Can Obtain a Fair Return on Their Investment

The type of economic impact that results in a taking is that which "is so severe that the [challenged regulation] has essentially appropriated [ ] property for public use." *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998). It is well settled that even a substantial decrease in value does not constitute a taking so long as there remains an economically viable use for the property:

> [O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to

> demonstrate a taking. *See, e.g.*, *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 384… (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 … (1915) (92.5% diminution).

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993); *see also Penn Central Transp. Co. v. New York*, 438 U.S. 104, 131 (1978) ("[Our decisions] uniformly reject the proposition that diminution in property value alone, can establish a 'taking[.]'"); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979).

Focusing on the generic "impact" of the ordinance, i.e., the so-called "premium," the Park Owners advance the economic theory that vacancy control will create a premium but not make housing more affordable. Not only is this "economic impact" to a group of homeowners irrelevant to whether something the landlord did not pay for was "taken" from it, the Park Owners' *policy* argument (1) advances an economic theory with which the legislature is free to disagree, and (2) fails to consider the obverse economic impact of *no* vacancy control, which would allow a landlord to completely destroy any potential for equity in the homes.

As the district court found, furthermore, the Park Owners earned a positive rate of return on their investment, thus indicating that *no* diminution in value occurred as that term was previously understood by all other takings cases. The possibility that the Park Owners could have earned additional profit if the law did

not exist does not mean that the Ordinance has resulted in a taking. Indeed, the "economic impact" factor does not turn on whether alternative uses for the property would be more profitable.

This point is best proven by *Penn Central* itself. There, the owners of the Grand Central Terminal challenged a New York law that prohibited them from building a skyscraper on top of the existing building. *Penn Central*, 438 U.S. at 115-117. In examining the effect of the law, the Court recognized that the law did not prohibit the *existing use* of the property (which the Supreme Court characterized as the "primary expectation") and permitted a reasonable return on investment. *Penn Central*, 438 U.S. at 136. "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is simply untenable." *Id*. at 130.

In the rent control context, the "economic impact" factor looks to whether the ordinance provides procedures to allow the landlord to obtain a fair return on its investment. *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 964 (1999); *MHC Operating Limited Partnership v. City of San Jose*, 106 Cal. App. 4th 204, 220 (2003). The Constitution does not provide landlords with a constitutional right to achieve unregulated market rents (if it did, then by definition no rent control would be constitutional). *See, e.g.*, *William C. Haas & Co.*, 605 F.2d at

1120-21 (reduction in value from $2 million to $100,000 was not enough to constitute a taking); *Federal Home Loan Mortg. Corp. v. New York State Div. of Housing & Comm. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996) ("Although FHLMC will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents."). Accordingly, this factor does not weigh in favor of the Park Owners' takings claim.

2. The Ordinance Does Not Interfere With the Park Owners' Investment-Backed Expectations

"The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 383-84 (9th Cir. 2002) (accord). "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Here, the Ordinance does not effect a taking because there can be no violation of the Park Owners' *investment-backed* expectations. Quite simply, the Park Owners got exactly what they paid for – a mobilehome park subject to a detailed rent control ordinance. GSMOL therefore notes that rather than the Park Owners having investment-backed expectations contrary to rent control, it is the

homeowners who have invested heavily in their homes, many with their life savings. One of the primary benefits of manufactured-home ownership over apartment renting is the ability to invest in a home, perhaps realize some appreciation if the housing market cooperates, and then sell the home while retaining one's nest egg. For apartment tenants, rent paid to the landlord is simply gone, depleting a tenant's savings. This distinction is especially important for seniors and others on fixed incomes who may wish to own their own home but later become unable to care for themselves and require use of their home equity to pay for ongoing care.

The conclusion advanced by the Park Owners would essentially vitiate all of the investments of the homeowners, leaving them at the unfettered control of landlords who, remarkably, paid a price for the land reflecting the regulated rental stream and yet now seek an enormous windfall from the Court. That is far from the violation of the Park Owners' "investment-backed expectation" the takings clause is intended to prevent. *Cf. Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 685 (6th Cir. 2004) ("[P]laintiffs were well aware of the [challenged laws] prior to making any investments . . ., and could not, therefore have reasonably expected a greater return.").

3. The Character of the City's Action Does Not Amount to a Physical Taking

The final *Penn Central* factor looks to whether the challenged law "amounts to a physical invasion." *Lingle*, 544 U.S. at 539. "[T]he character of the government action is best viewed in the context of the industry it regulates." *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 861 (9th Cir. 2001), *aff'd on other grounds* 538 U.S. 216 (2003).

The "character" of the challenged law here is that of a price control. Price controls on rent fall squarely within the government's legitimate police powers. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 440 (1982). The Ordinance is thus a paradigmatic "public program adjusting the benefits and burdens of economic life to promote the common good" rather than a "physical invasion by government." *Penn Central*, 438 U.S. at 124. Nothing in *Penn Central* or its progeny suggests that rent control, including vacancy control, is akin to a physical taking. Indeed, in *Yee* the Supreme Court held that it was *not*:

> The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case, . . . but the existence of the transfer in itself does not convert regulation into physical invasion. . . . [A] typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect . . . has nothing to do with whether the ordinance causes a physical taking. Whether the ordinance benefits only current mobile home

> owners or all mobile home owners, it does not require petitioners to submit to the physical occupation of their land.

Yee, 503 U.S. at 529-30.

The Park Owners argue that because other forms of rents are not similarly controlled, they are "singled out" to bear a heavy burden. As noted, however, mobilehome parks must by necessity be "singled out" for different regulation than apartments because they pose different risks to "tenants." Apartment tenants make minimal investments in their homes. Manufactured-home owners make large investments in what are typically their largest assets, cannot realistically take the homes with them if they move from the park, and should not be left to the discretion of park owners as to whether they can resell their homes for a profit.

Courts have held that there is nothing wrong constitutionally with fixing one market problem and not others. Approving the legislature's prerogative to focus a rent regulation on particular properties, the Supreme Court has held that governments "need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest." *Pennell*, 485 U.S. at 14-15 (citation omitted). Here, the Park Owners' position would stand the "shared burden" principle on its head, providing them with a huge windfall by transferring to them all of the equity in the park's manufactured homes, although the homeowners – not the Park Owners – paid for that equity.

Given the prevalence of similar legislation across California, the well-established reasons for providing manufactured-home owners greater protections than apartment dwellers, and the fact that the Park Owners paid a price reflecting the rent controlled nature of the land, the Park Owners' argument that Goleta's Ordinance is akin to an impermissible physical invasion is wholly unsupportable.

IV. CONCLUSION

On behalf of its statewide membership, for the reasons stated above, GSMOL respectfully urges this Court to affirm the decision of the district court.

Dated: April 16, 2010

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(b), the Brief of Amicus Curiae is produced using at least 14-point Times New Roman type including footnotes and contains approximately 4,324 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 16, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* GOLDEN STATE MANUFACTURED-HOME OWNERS LEAGUE IN SUPPORT OF DEFENDANT-APPELLEES CITY OF GOLETA, ET. AL. ON REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Cynthia Cornell