No.

IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a divided *en banc* panel of the Ninth Circuit distinguished *Palazzolo* on the basis that the plaintiff there had acquired the property by operation of law (instead of purchasing it) and held that the fact that petitioners had purchased the property subject to the challenged regulation was "fatal to [petitioners'] claim."

Is the purchaser of property subject to a regulatory restriction foreclosed from challenging the restriction as a violation of the Takings Clause?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions & Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioners Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals has been designated for publication and is electronically reported at 2010 WL 5174984. Pet. App. 1a. The opinions of the district court are unpublished. *Id.* at 142a, 148a.

JURISDICTION

The court of appeals filed its opinion on December 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

The relevant provisions of the Santa Barbara County Code are set forth in the appendix to this petition.

STATEMENT

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause," finding it to be "illogical," "unfair," and "capricious." *Id.* at 626–28. In this case, the Ninth Circuit barred petitioners' claim that a city ordinance effected a regulatory taking on the sole ground that the ordinance was "promulgated long before [petitioners] bought their land." Pet. App. 14a. Because that holding "directly contravenes Supreme Court precedent," *id.* at 35a (Bea, J., dissenting), as well as decisions of the Federal Circuit and numerous state appellate courts, this Court should grant certiorari.

1. In 1979, the county of Santa Barbara, California, adopted an ordinance that capped the rent that owners of mobile-home parks could charge tenants for use of the land. *See* Pet. App. 4a. The ordinance restricted owners to once-yearly rent increases and limited increases to 75% of inflation unless an arbitrator determines that a further increase is justified based on operating costs, capital investments, and other factors. *Id.* at 6a n.10, 160a–70a.

In 1997, petitioners purchased a mobile-home park in Santa Barbara County. Pet. App. 6a. Five years later, the area in which petitioners' park is located was incorporated into the new city of Goleta, which is the respondent here. *Id.* The City enacted an ordinance on the first day of its existence, February 1, 2002, that kept in force all pre-existing Santa Barbara County ordinances for a preliminary period of 120 days. *Id.* at 6a–7a. The City subsequently chose to readopt the full county code as its own law. *Id.* at 7a. In 2002, the application of the rent-control

ordinance to petitioners' property limited the rent that petitioners could collect to 20% of fair market levels. *Id.* at 31a (Bea, J., dissenting).

2. On March 25, 2002, petitioners filed suit against the City in the United States District Court for the Central District of California under 42 U.S.C. § 1983 and state law seeking a declaratory judgment that the ordinance was void and appropriate money damages. They alleged a number of federal- and state-law claims, including that the re-enacted ordinance violated the Fifth Amendment's Takings Clause (as incorporated against the States by the Fourteenth Amendment). Pet. App. 8a & n.9.

In October 2002, the district court stayed the action to permit the parties to litigate the state-law claims in California court. *See R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). After the parties settled those claims, the district court granted petitioners summary judgment on the takings claim, holding that the ordinance "fails to substantially advance its stated purpose" of creating affordable housing—the standard for regulatory-takings claims under then-governing Ninth Circuit precedent. Pet. App. 157a, 159a. The court found that because the ordinance "contain[ed] no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile homes," it did not meet the goal of ensuring low-cost housing. *Id.* at 156a–57a.

While that ruling was on appeal, this Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which rejected the Ninth Circuit's "substantially advances" standard. *See id.* at 548. The parties accordingly agreed to a vacatur of the district court's ruling and a remand. Pet. App. 9a.

Petitioners moved again for summary judgment, but the district court denied their motion. Pet. App. 142a. On the eve of trial, the district court *sua sponte* ordered petitioners to show cause why summary judgment should not be granted in favor of the City. The court entered judgment for the City on September 5, 2006. *Id.* at 142a–47a.

A divided panel of the Ninth Circuit reversed. *See* Pet. App. 55a–141a. The panel held that the ordinance constituted an unconstitutional regulatory taking, applying the three-factored balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978): "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action." Pet. App. 97a. With respect to investment-backed expectations, the panel concluded that this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which authorized a takings claim by a plaintiff who did not own the property when the challenged regulation first went into effect, "permits property owners who have purchased property subject to the regulations they challenge to bring regulatory takings claims under *Penn Central*." Pet. App. 113a; *see also id.* at 109a ("Our analysis of this issue is controlled by *Palazzolo*.").

The panel further explained that on the facts of this case "the question of investment-backed expectations is not determinative but must be considered in tandem with the economic impact of the regulation on the Park Owners, and the character of the governmental action." Pet. App. 117a. The panel held that the "economic impact" of the ordinance was severe, given that petitioners had presented evidence that the ordinance caused them to rent their prop-

erty "at close to an 80 percent discount below the market rate," and that the character of the governmental action was such that it "[s]ingl[ed] out mobile home park owners" while declining to "impose comparable costs on any other property owners in the City." *Id.* at 100a, 120a, 122a. Weighing all three factors, the panel held that "[o]n balance, the [ordinance] 'goes too far' and constitutes a regulatory taking under the Fifth and Fourteenth Amendments for which just compensation must be paid." *Id.* at 123a (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Judge Kleinfeld dissented on the ground that petitioners had "purchased the park after the regulatory takings" had occurred. *Id.* at 133a (Kleinfeld, J., dissenting).

3. The Ninth Circuit granted the City's petition for rehearing *en banc* in March 2010, vacating the panel's opinion. A divided 11-member panel of the court then affirmed the district court. Pet. App. 1a–25a. The majority held that the *Penn Central* factor of "'the extent to which the regulation has interfered with distinct investment-backed expectations'" was "fatal to [petitioners'] claim." *Id.* at 18a. Because the City's ordinance was "promulgated long before [petitioners] bought their land," the majority stated, "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 14a, 18a. Petitioners "could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent." *Id.* at 19a.

The *en banc* majority distinguished *Palazzolo* on the ground that the takings claim there was an "as-applied" challenge in which title to the property had passed to the plaintiff by operation of law before the claim was ripe—not a "facial" challenge in which the

prior owner could have brought a takings claim before selling the property. Pet. App. 15a–16a. Although *Palazzolo* broadly rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause" merely because they "purchased or took title with notice of the limitation," 533 U.S. at 626, the Ninth Circuit held that *Palazzolo* did not control because in that case "title shifted to [the plaintiff] because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation." Pet. App. 15a.

Rather than independently analyzing the other *Penn Central* factors, the *en banc* panel held that the fact that petitioners purchased the property after the ordinance first went into effect was conclusive as to them as well: There was no "economic effect" on petitioners because "[w]hatever unfairness . . . might have been imposed by rent control . . . was imposed long ago, on someone earlier in the Guggenheims' chain of title," and the City's readoption of the ordinance "did not adjust the benefits and burdens of economic life," but rather "left them as they had been for many years." Pet. App. 21a.

Judge Bea dissented, joined by Chief Judge Kozinski and Judge Ikuta. *See* Pet. App. 25a–54a. He explained that the majority opinion "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation imposes on property-owners." *Id.* at 46a (quoting *Palazzolo*, 533 U.S. at 627). Because "the Supreme Court has specifically held that the fact claimants knew of a land-use regulation at the time they took title to their land does *not* bar them from challenging that regulation, nor from contend-

ing that the ordinance lessened the value of their land by interference with their investment-backed expectations," the majority opinion "directly contravenes Supreme Court precedent." *Id.* at 34a–35a (emphasis in original). The majority's "attempts to distinguish *Palazzolo*" on the grounds that it addressed an as-applied challenge and that the transfer there had been effected by operation of law were misguided, Judge Bea stated, because this Court's precedents "gave us rules of general application as to what constitutes a regulatory taking" that do not turn on those facts. *Id.* at 36a. It therefore did "not come as a surprise," he wrote, that "the majority's stance on this subject comes without legal authority." *Id.*

Judge Bea further explained that the majority's "misprism [*sic*] of Supreme Court precedent is made worse by the majority opinion's failure to recognize specific evidence of [petitioners'] investment-backed . . . expectations." Pet. App. 37a. Petitioners had proffered evidence demonstrating that they had reasonably believed when they purchased the property that the ordinance would be abolished or invalidated. *See id.* at 37a–39a. Analyzing that evidence and applying all three of the *Penn Central* factors, Judge Bea concluded that "[a]t a *minimum*, the case should be remanded for trial on the severity of the economic impact on the claimants, the existence of investment-backed expectations, and the character of the governmental action." *Id.* at 46a (emphasis in original). "[T]hese are at least mixed questions of fact and law," Judge Bea stated, "on which reasonable triers of fact could find that there was a taking." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari and either summarily reverse or schedule the case for full briefing and argument. As the dissent noted, the Ninth Circuit's decision "directly contravenes" *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), by "holding as a matter of law[] that the Ordinance could not interfere with [petitioners'] 'distinct investment-backed expectations'" because it predated their acquisition of the property. Pet. App. 28a, 35a (Bea, J., dissenting). The purported distinctions that the majority drew with *Palazzolo* "are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at 36a–37a.

Because the import of *Palazzolo* is so clear, it should come as little surprise that the decision below also conflicts with precedents from the Federal Circuit and numerous state appellate courts faithfully applying this Court's holding. The Federal Circuit has squarely held, in the context of postenactment purchasers, that *Palazzolo* "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009). And both before and after *Palazzolo*, the "majority of [state appellate] courts ha[d] held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds." *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 555 (Colo. 1988).

The decision below represents a major blow to private property rights and promises to augment the

power of state and local governments to enact confiscatory land-use regulations without paying just compensation. In addition, the decision will cause perverse effects in local real-estate markets, as property owners will be reluctant to sell property subject to new regulations imposing potentially compensable takings. This Court's review is warranted.

I. THE NINTH CIRCUIT'S HOLDING THAT A POSTENACTMENT PURCHASER MAY NOT PREVAIL ON A TAKINGS CLAIM CONFLICTS WITH *PALAZZOLO* AND OTHER DECISIONS OF THIS COURT.

1. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The "basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304, 315 (1987). The Takings Clause applies to the States through the Fourteenth Amendment. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238–39 (1897).

For nearly one hundred years, this Court has recognized that a compensable taking can occur not only when the government physically seizes or intrudes upon land, but also when it enacts a "regulation [that] goes too far" in diminishing the value of the property. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). For example, if a regulation "deprive[s] an owner of '*all* economically beneficial us[e]' of her property," the regulation categorically qualifies as a taking that requires just compensation. *Lingle v.*

Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis and alteration in original).

When a regulation does not deplete the property of all value, the question whether it amounts to a taking is governed by the flexible test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the purpose of which is to prevent "some people alone [from] bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123–24. Although the *Penn Central* test eschews "any 'set formula'" in favor of "essentially ad hoc, factual inquiries," this Court has enumerated "factors that have particular significance." *Id.* at 124. Those factors include (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 (quoting *Penn Central*, 438 U.S. at 124).

2. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court addressed whether a plaintiff could prevail on a regulatory takings claim if he did not own the property at the time the challenged regulation was enacted. In *Palazzolo*, a corporation had purchased a parcel of land but had been repeatedly denied permission by the state of Rhode Island to develop the land over a period of years. During the administrative proceedings, the corporation dissolved and title to the property passed to its sole shareholder. The shareholder eventually brought an inverse condemnation action in state court, challenging the state's actions as a regulatory taking under *Penn Central*. The Rhode Island Supreme Court denied his claim, finding "the date of acquisition of the

parcel [to be] determinative," and holding that "he could have had 'no reasonable investment-backed expectations that were affected by this regulation' because it predated his ownership." *Id.* at 616.

Reviewing that decision, this Court considered whether "acquisition which postdates the regulation" bars a regulatory takings claim. 533 U.S. at 618. The Court rejected what it described as the Supreme Court of Rhode Island's "single, sweeping rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier enacted restriction and is barred from claiming that it effects a taking." *Id.* at 626. The Court explained that the "theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause" was that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value." *Id.*

"The State," this Court explained in declining to adopt that reasoning, "may not put so potent a Hobbesian stick into the Lockean bundle." 533 U.S. at 627. "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule." *Id.*

The Court observed that Rhode Island's proposed rule threatened not only postenactment purchasers, but also the original property owners: "The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is

stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself." 533 U.S. at 627. The theory that postenactment purchasers could not prevail on takings claims was, the Court said, "quixotic" and "capricious in effect"—"[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628.

The Court drew its holding in *Palazzolo* from its prior decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which it described as "controlling precedent." 533 U.S. at 629. In *Nollan*, the question presented was whether a state government could condition a development permit on the property owner's consent to a public easement across the property. 483 U.S. at 827. The principal dissent had argued that because the state had established a blanket policy of requiring such easements well before the plaintiffs had purchased their property, the plaintiffs had been "'on notice that new developments would be approved only if provisions were made for lateral beach access.'" *Palazzolo*, 533 U.S. at 629 (quoting 483 U.S. at 860 (Brennan, J., dissenting)). But "[a] majority of the Court rejected the proposition": "'So long as the Commission could not have deprived the prior owners of the easement without compensating them,' the Court reasoned, 'the prior owners must be understood to have transferred their full property rights in conveying the lot.'" *Id.* at 629 (quoting 583 U.S. at 834 n.2).

Even before *Nollan*, this Court had rejected the position that postenactment purchasers could never prevail on a regulatory takings claim. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court considered the

constitutionality of a prohibition on the sale of parts of birds legally killed before a ban on their killing had gone into effect. *See id.* at 52. Although the Court ultimately upheld the challenged regulations after conducting a full *Penn Central* analysis, it refused to adopt the government's threshold argument that the takings claim was barred because the plaintiffs had "not clearly stated that they acquired their property interest in the bird artifacts before the sales ban came into force." *Id.* at 64 n.21. The "timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations," the Court held, "but it does not erect a jurisdictional obstacle at the threshold." *Id.* Although couched in terms of standing, the decision in *Andrus* clearly eschewed a bright-line rule barring all takings claims by a postenactment purchaser, in line with the subsequent decisions in *Palazzolo* and *Nollan*.

3. Justices Scalia and O'Connor each wrote concurrences in *Palazzolo* further explaining why they rejected a rule prohibiting postenactment purchasers from prevailing on regulatory takings claims. Justice Scalia drew a bright line: "In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." 533 U.S. at 637. That is because the "'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Id.*

Justice O'Connor set forth a more flexible test through which the fact that a purchaser bought with notice of the challenged regulation would be one fac-

tor in the overall analysis. She agreed that "the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use." 533 U.S. at 632. Although the "regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the claimant's] expectations," the "state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations," and, furthermore, "the degree of interference with investment-backed expectations . . . is [only] *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Id.* at 634 (emphasis in original). Justice O'Connor cautioned that "[i]f investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title." *Id.* at 635.

Even in dissent, Justice Breyer stated that he "agree[d] with Justice O'Connor" that "much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist." 533 U.S. at 654–55.

4. The Ninth Circuit's holding cannot be reconciled with this Court's holdings in *Palazzolo*, *Nollan*, or *Andrus* or any of the Justices' separate opinions addressing the issue of postenactment purchasers. The Ninth Circuit held that the investment-backed expectations factor was "fatal to [petitioners'] claim." Pet. App. 18a. Petitioners "could have no 'distinct

investment-backed expectations,'" the majority reasoned, because "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a–19a. In other words, public notice of a value-depleting regulation is sufficient to bar a subsequent purchaser from challenging it under *Penn Central*. That holding is incompatible with this Court's teaching that "the postenactment transfer of title [does not] absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." 533 U.S. at 627.

The Ninth Circuit distinguished *Palazzolo* on the ground that in that case "title shifted to [the plaintiff] because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation." Pet. App. 15a. That distinction between purchasers and those who acquire land by operation of law cannot be squared with the rule set out in *Palazzolo*, which repeatedly referred to "postenactment *purchasers*," not merely those who acquire property by operation of law. 533 U.S. at 626 (emphasis added); *see also, e.g.*, *id.* at 628 ("A blanket rule that *purchasers* with notice have no compensation right when a claim becomes ripe is too blunt an instrument . . . .") (emphasis added). Indeed, one of the concerns driving the Court's analysis in *Palazzolo* was that a contrary rule would capriciously penalize "the owner with the need *to sell*" by denying him the ability to obtain full value for the land, in contrast with "the owner with the resources to hold" while challenging the regulation in court. *Id.* (emphasis added).

If there were any doubt that *Palazzolo*'s holding extended to purchasers, *Nollan* would dispel it. The plaintiffs in *Nollan* had purchased their property

"well after the [government] had begun to implement its policy," but this Court rejected the proposition that their "rights [were] altered" as a result. 483 U.S. at 827–28, 833 n.2. "So long as the [government] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* Given that *Nollan*'s holding indisputably concerned post-enactment *purchasers*, and *Palazzolo* cited *Nollan* as "controlling precedent," there can be no doubt that the Ninth Circuit erred in distinguishing *Palazzolo* on the ground that the transfer to the plaintiff has been effected by operation of law. The dissent below was therefore correct that "the majority opinion provides no justification or legal support for why these proposed distinctions matter." Pet. App. 37a (Bea, J., dissenting).[1]

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[1] The Ninth Circuit also distinguished *Palazzolo* on the ground that it addressed an "as-applied" challenge—that is, a lawsuit brought after the specific denial of a development application (*see* 533 U.S. at 616)—as opposed to a "facial" challenge that the regulation constitutes a taking "no matter how it is applied" (*Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Pet. App. 16a–17a. The Ninth Circuit presumed that *Palazzolo* was limited to as-applied challenges that ripened only after title passed to the new owner, but one searches the decision in vain for that limitation. In fact, *Palazzolo* makes clear that it is *not* limited to the relatively short period before an as-applied claim ripens: "*Future generations*," the Court said, "have a right to challenge unreasonable limitations on the use and value of land." 533 U.S. at 627 (emphasis added). Such a generational scope belies any notion that *Palazzolo* was restricted to the narrow temporal window during which an as-applied claim ripens. Were the holding of *Palazzolo* so limited, the government could succeed in "put[ting] an expiration date on the Takings Clause"—precisely the result *Palazzolo* aimed to avoid. *Id.*

Because the Ninth Circuit ruled that petitioners' postenactment acquisition of title alone was "fatal" to their claim, it did not apply the *Penn Central* test, failing "to provide any analysis of the general economic impact of the Goleta Ordinance on the claimant," the "specific evidence of [petitioners'] investment-backed expectations," or "the character of the governmental action." Pet. App. 29a–30a, 37a, 43a (Bea, J., dissenting). The Ninth Circuit thus ignored the principle that "the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations" and that "the degree of interference with investment-backed expectations . . . is [only] *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

Indeed, even aside from *Palazzolo*, the decision below ignored decades of this Court's precedent holding that investment-backed expectations are only one factor that must be balanced against the other *Penn Central* considerations. *See, e.g.*, *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 n.10 (2002) ("The *Penn Central* analysis involves a complex of factors . . . ."). And in appropriate cases, this Court has not hesitated to find a regulatory taking even in the absence of any recognizable investment-backed expectations. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding a regulatory taking even where evidence of investment-backed expectations was "dubious").

The decision below "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation im-

poses on property-owners." Pet. App. 46a (Bea, J., dissenting) (quoting *Palazzolo*, 533 U.S. at 627). This Court should therefore grant certiorari.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FEDERAL CIRCUIT AND SEVERAL STATE APPELLATE COURTS.

The Ninth Circuit's decision also conflicts with those courts that have faithfully applied *Palazzolo* according to its plain terms, as well as pre-*Palazzolo* state-court decisions.

1. Among the federal courts of appeals, the Federal Circuit hears the largest share of takings claims because the Court of Federal Claims has exclusive jurisdiction over claims seeking over $10,000 in damages from the federal government. *See E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality op.). That circuit's oft-applied interpretation of *Palazzolo* directly conflicts with the holding of the Ninth Circuit. For example, in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), a property owner challenged a determination by the U.S. Fish and Wildlife Service that it could not develop a parcel of land without meeting certain conditions because the land was part of a critical wildlife habitat under the Endangered Species Act. The Court of Federal Claims had suggested "that because the critical habitat designation occurred in 1977, subjecting the property to certain regulatory restrictions, and [the plaintiff] did not purchase the land until 2000," the plaintiff could not succeed on a takings claim. *See id.* at 1366.

The Federal Circuit rejected that line of reasoning. Citing *Palazzolo*, the court held that the plaintiff's "knowledge of the regulation is not per se dispositive, although it is a factor that may be considered,

depending on the circumstances." *Schooner Harbor Ventures*, 569 F.3d at 1366. Contrary to the interpretation of the Ninth Circuit, the Federal Circuit correctly explained that *Palazzolo* had "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Id.* The Federal Circuit instructed the Court of Federal Claims on remand not to deny the takings claim solely on that ground. *Id.*

Schooner Harbor Ventures was merely an application of the Federal Circuit's longstanding interpretation of *Palazzolo* as "reject[ing] the theory that 'a person who purchases property after the date of the regulation may never challenge the regulation.'" *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2003)). As the *en banc* Federal Circuit has put it, "[w]here a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (*en banc*).

The *en banc* Federal Circuit's faithful application of *Palazzolo* squarely conflicts with the *en banc* Ninth Circuit's holding below. The Federal Circuit has not restricted the *Palazzolo* rule to property owners who acquired an interest by operation of law or to situations where the previous owner's claim would not yet have been ripe. *See, e.g.*, *Schooner Harbor Ventures*, 569 F.3d at 1366 (plaintiff purchased land 23 years after critical wildlife designation); *Appolo Fuels*, 381 F.3d at 1342, 1348–51 (applying full *Penn Central* analysis to plaintiff that

purchased property "more than a decade after the enactment" of the challenged regulation).

2. Takings claims are most often litigated in state courts. Even prior to *Palazzolo*, the "majority of courts ha[d] held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds." *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 555 (Colo. 1988). And not surprisingly, since *Palazzolo*, those state courts of last resort to apply the decision have uniformly rejected the Ninth Circuit's contrary rule.

For example, in *Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 623 (Minn. 2007), the Minnesota Supreme Court considered a challenge by the owner of a golf course to a city's ban on residential development enacted before the owner had purchased the property. *See id.* at 627.[2] Applying *Penn Central*, the court considered how his postenactment purchase impacted the "investment-backed expectations" factor. It explained that under *Palazzolo* the fact that "residential development of the property was prohibited when [the owner] purchased the property is relevant to determining the reasonableness of [his] expectations, but [his] awareness of the restrictions does not automatically defeat the takings claim," overruling the lower appellate court's contrary ruling. *Id.* at 638. It proceeded to analyze the specific facts relating to the owner's investment-

[2] Although the Minnesota Supreme Court applied its own constitution's Takings Clause, it explained that "[w]e have . . . relied on cases interpreting the U.S. Constitution's Takings Clause in interpreting this clause in the Minnesota Constitution." *Id.* at 631–32.

backed expectations, ultimately concluding that the factor favored the city, and it separately analyzed the other *Penn Central* factors, resolving the "character of the government action" factor against the city and finding the record inconclusive on the "economic impact" factor. *Id.* at 639, 641. It accordingly remanded for further factual development of the "determinative factor in this case . . . whether the denial of the comprehensive plan amendment leaves the property owner with any reasonable use of the property." *Id.* at 641. In contrast to the Ninth Circuit's holding, the plaintiff's notice of the regulation before purchasing the property was not "fatal" to his claim.

Other state supreme courts have issued similar rulings in light of *Palazzolo*. In *State ex. rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002), a challenge to a zoning ordinance by a postenactment purchaser, the Supreme Court of Ohio rejected the government's contention that "there can be no taking because the challenged single-family residential zoning existed at the time [the plaintiffs] acquired the property." *Id.* at 352. The Court explained that *Palazzolo* "rejected a similar argument that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted land restriction and is barred from claiming that it effects a taking." *Id.*; *see also State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs*, 875 N.E.2d 59, 67 (Ohio 2007) (purchasing property with notice of zoning regulations "is not necessarily a bar to a taking claim" though "a property owner's awareness of regulations may be relevant in a *Penn Cent.* partial taking.").

And immediately after *Palazzolo*, the Court of Appeals of Maryland (that State's highest court) overruled a prior precedent preventing postenactment purchasers from receiving just compensation.

In *Richard Roeser Professional Builder, Inc. v. Anne Arundel County*, 793 A.2d 545 (Md. 2002), the court considered whether a landowner could be denied a variance from a zoning law solely on the ground that "[a]t the time it contracted to purchase the property, [the purchaser] knew" of the zoning law. *Id.* at 547. The court noted that prior to *Palazzolo*, "there was some concern expressed in the land use community as to whether when a purchaser obtained title to property already subject to environmental restrictions, he . . . could not assert 'taking' claims, even if the restrictions denied him all viable economic use." *Id.* at 556. But, the court concluded, the "Supreme Court has now answered the questions raised." *Id.* It accordingly held, applying state law in light of the constitutional holding of *Palazzolo*, that a property owner is not barred from seeking a variance from a zoning law merely because he purchased with notice of the law. *Id.* at 560–61; *see also Stansbury v. Jones*, 812 A.2d 312, 326 n.11 (Md. 2002) ("Under the Supreme Court's case of [*Palazzolo*] and our recent case of *Roeser*, . . . the fact that the statute predated an owner's purchase of a subject property would have no bearing on the ability of an owner to seek variance relief.").

Perhaps most significantly, the Ninth Circuit's decision conflicts with the understanding of *Palazzolo* adopted by California appellate courts, resulting in an intra-state split of authority. In *Mehling v. Town of San Anselmo*, No. A102563, 2004 WL 1179428 (Cal. App. 1st Dist. May 28, 2004), California's First District Court of Appeal correctly explained—in direct conflict with both the holding and reasoning of the Ninth Circuit—that "[t]he Supreme Court's decision did *not* turn on th[e] fact" that "title was transferred by operation of law." *Id.* at *6 n.6

(emphasis added). The "holding and rationale of *Palazzolo* apply regardless of whether title to the property is transferred by operation of law or purchased in an arm's length transaction." *Id.* The California Supreme Court has suggested that it concurs with this interpretation of *Palazzolo*. *See Travis v. County of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004) (explaining that *Palazzolo* discredited the "idea that a postenactment purchaser takes with notice of the legislation and therefore cannot claim it effects a taking").

* * *

Because the holding of the Ninth Circuit squarely conflicts with the precedents of this Court, the Federal Circuit, and numerous state appellate courts, including California courts, this Court should grant certiorari and resolve the conflict.

III. ADHERENCE TO THIS COURT'S HOLDINGS IN *PALAZZOLO* AND *NOLLAN* IS EXCEEDINGLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS AND ECONOMIC FAIRNESS.

In the decision below, the Ninth Circuit—which governs over one-third of the land area of the United States and one-fifth of its population[3]—erected an insuperable barrier to takings challenges to regulatory restrictions of all stripes once the affected property changes hands in the private market. Given the fluidity of the American real estate market, the decision effectively insulates a wide swath of potentially unconstitutional regulations from challenge and promises to award governments unlawful windfalls at the expense of property owners.

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[3] *See* http://quickfacts.census.gov/qfd/index.html (last visited Mar. 10, 2011).

Because it bars postenactment purchasers from challenging land-use regulations under the Takings Clause, "no matter how extreme or unreasonable," the Ninth Circuit's inflexible, bright-line rule will lead to harsh and unjust results. *Palazzolo*, 533 U.S. at 627. As this Court noted in *Palazzolo*, the rule is "capricious in effect," because "[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628. For example, if a land-use regulation deprives a landowner of her only means of livelihood, she may not have the resources to engage in a protracted legal battle with the State government. But she will be unable to recover anything close to the full value of the property in the private market, no matter how obvious it is that the regulation qualifies as a taking under *Penn Central*, because potential purchasers will know that they will be unable to prevail on a takings claim. The holding below thus "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627.

Moreover, the Ninth Circuit's rule would preclude challenges to regulations that have become compensable takings over time due to changes in market conditions. For example, as the dissent noted, a rent-control ordinance might not be sufficiently onerous at the time of enactment to qualify as a taking under *Penn Central*, but "as the years go by, . . . [the] disparity between market and regulated rents will increase and the magnitude of the [regulation's] impact will grow." Pet. App. 31a n.5 (Bea, J., dissenting). If the property changes hands in a market transaction during that time, the Ninth Circuit's rule

would bar a challenge that the statute effects a taking. And relatedly, the decision creates an incentive for state and local governments to keep in place regulations that have outlived their usefulness or have become unduly confiscatory because the adoption of new regulations could trigger the right of new owners to challenge them.

Perhaps of most consequence, the Ninth Circuit's holding threatens to slow activity in the local real-estate market whenever a potentially unconstitutional ordinance is enacted, because both purchasers and sellers will know that any takings claim will be extinguished if subject property is sold before the matter is resolved in court. The time value of the mutual gains from the delayed transactions will therefore be permanently lost. There is no sound reason for such a waste of resources in the purpose or history of the Takings Clause, this Court's precedents, or common sense.

IV. PETITIONERS HAVE SUFFERED A COMPENSABLE REGULATORY TAKING.

The Ninth Circuit *en banc* majority did not conduct the *Penn Central* analysis required by this Court's precedents, but both the original panel majority and the *en banc* dissent did conduct that analysis and found at least a question of fact precluding summary judgment. That analysis was correct. Under the first *Penn Central* factor, neither the parties nor the district court "dispute[d] that the Ordinance seriously impacted the value of [petitioners'] property." Pet. App. 30a (Bea, J., dissenting). Petitioners "presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land." *Id.* There is no serious doubt that "a finder of fact could easily de-

termine that a loss of 80% of the market value of property is . . . a severe economic burden." *Id.* at 32a.

As to petitioners' investment-backed expectations, petitioners "had a reasonable expectation of freeing their land from the Ordinance through political or legal means," a belief that was "at least plausible in light of contemporary legal, political, and academic thought." Pet. App. 39a, 43a (Bea, J., dissenting). Moreover, the fact that a new city with a new legal code was scheduled to replace the prior county government gave petitioners at least a reasonable prospect that the rent-control system would be eliminated or modified.

Finally, with respect to the character of the government action, because the ordinance "restricts only the amount the landowner can charge a tenant for rental of the mobile home parcel," not "the amount which that tenant, in turn, can demand for sale or lease of the mobile home," it fails to achieve its stated purpose of protecting "owners and *occupiers* of mobile-homes from unreasonable rents." Pet. App. 43–44a (Bea, J., dissenting). Rather, the "designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home." *Id.* at 44a; *see Yee v. Escondido*, 503 U.S. 519, 530 (1992) (that an ordinance "transfers wealth only to the incumbent mobile home owner" bears on "whether the ordinance causes a regulatory taking"). One reasonably could conclude that Goleta's is not a "public program adjusting the benefits and burdens of economic life to promote the

common good," but rather a special-interest give-away. *Penn Central*, 438 U.S. at 124.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 11, 2011

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; MAUREEN H. PIERCE, *Plaintiffs-Appellants,* v. CITY OF GOLETA, a municipal corporation, *Defendant-Appellee*.	No. 06-56306 D.C. No. CV-02-02478-FMC OPINION

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, District Judge, Presiding

Argued and Submitted
June 22, 2010—Pasadena, California

Filed December 22, 2010

Before: Alex Kozinski, Chief Judge, Alfred T. Goodwin, Stephen Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Ronald M. Gould, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Opinion by Judge Kleinfeld;
Dissent by Judge Bea

COUNSEL

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Elizabeth B. Wydra (briefed), Constitutional Accountability Center, Washington, D.C., for amici curiae American Planning Association, APA California, Constitutional Accountability Center, and Western Center on Law and Poverty.

Meliah Schultzman (briefed), National Housing Law Project, Oakland, California, for amici curiae AARP, California Coalition for Rural Housing, Housing

California, Legal Services of Northern California, Non-Profit Housing, Association of Northern California, R. Keith Traphagen, and Tenants Together.

OPINION

KLEINFELD, Circuit Judge:

We address the viability of a takings claim arising out of a rent control ordinance affecting mobile home parks.

I. Facts

In 1979, Santa Barbara County, California adopted a rent control ordinance for mobile homes.[1] Mobile homes have the peculiar characteristic of separating ownership of homes that are, as a practical matter, affixed to the land, from the land itself.[2] Be-

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1 Santa Barbara County, Cal., Ordinance 3, 122 (Oct. 22, 1979).

2 *See Yee v. City of Escondido:*

> 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. They are generally placed permanently in parks; once in place, only 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

cause 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. The Santa Barbara County rent control ordinance for mobile homes had as its stated purpose relieving "exorbitant rents exploiting" a shortage of housing and the high cost of moving mobile homes.[3] The rent

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[Footnote continued from previous page]

> in place, and the purchaser continues to rent the pad on which the mobile home is located.

503 U.S. 519, 523 (1992) (citation omitted).

[3] The first section of the ordinance provides the "purpose" of enacting it:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobile home parks in the County of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the Board of Supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobile home park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by

control ordinance was amended in 1987.[4] The ordinance has a complex scheme for setting rents, limiting how fast they rise, and affording landlords a mechanism for disputing the limits.[5]

Eighteen years after the original rent control ordinance went into effect, and ten years after the amendment, the plaintiffs *Daniel* and Susan Guggenheim and Maureen H. Pierce (the Guggenheims) bought a mobile home park, "Ranch Mobile Estates," burdened by the ordinance.

The park, when the Guggenheims bought it in 1997, was in what California calls "unincorporated territory" in Santa Barbara County. Five years later, in 2002, the City of Goleta incorporated in territory including the Guggenheims' land. California law requires a newly incorporated city comprising

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[Footnote continued from previous page]

> imposing rent controls in mobilehome parks within the unincorporated area of the County of Santa Barbara.

Goleta, Cal., Mun. Code § 08.14.010; *see also* Santa Barbara County, Cal., Ordinance 3,122 § 1 (Oct. 22, 1979), codified at Santa Barbara County, Cal., Code § 11A-1

4 Santa Clara County, Cal., Ordinance 3,678 (Dec. 21, 1987).

5 The ordinance limits the ability of park owners to increase rent of existing tenants. Park owners may only do so once a year, or at the termination of a lease term. Goleta, Cal., Mun. Code §§ 08.14.070-080. The amount of the increase is determined through arbitration. Goleta, Cal., Mun. Code § 08.14.040. Park owners can automatically raise rent by 75% of the local consumer price index (a measure of inflation), and may seek additional increases for various reasons provided in the ordinance. *Id.* § 08.14.050. When a tenant sells the mobile home to a new tenant, the park owner may only increase the rent by 10%. *Id.* § 08.14.140.

previously unincorporated territory to adopt, as its first official act, an ordinance keeping all the county ordinances in effect for 120 days or until the new municipality changes them, whichever happens first.[6] Goleta did what was required on its first day of existence, February 1, 2002, so the county rent control ordinance for mobile home parks became the city rent control ordinance on the first day of the City's existence, as the City's very first official act. And on April 22, 2002, within the 120-day sunset period, the City of Goleta adopted the county code including the ordinance, this time without the statutory 120-day sunset period.[7] The parties have stipulated that there was a legal gap when the ordinance was not in effect, apparently referring to the hours between the City's coming into legal existence and the performance of the City's first official act on its first day. Those hours on the first day of Goleta's existence are the only time between 1979 and the present day, and the only time during the Guggenheims' ownership, when no rent control ordinance has burdened the Guggenheims' mobile home park.[8]

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[6] Cal. Gov't Code § 57376(a) ("If the newly incorporated city comprises territory formerly unincorporated, the city council shall, immediately following its organization and prior to performing any other official act, adopt an ordinance providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation, or until the city council has enacted ordinances superseding the county ordinances, whichever occurs first.").

[7] Goleta, Cal., Ordinance 02-17 (Apr. 22, 2002).

[8] We say there was a gap because the parties so stipulated, but we do not imply a construction of California law to that effect. The California statute says that the newly incorporated

That year, 2002, the Guggenheims sued the City claiming that the rent control ordinance was a taking of their property without compensation, and asserting numerous other claims.[9] They have limited their takings claim to a facial challenge, not an "as applied" challenge. They claim that it is the rent control ordinance itself, not its particularized application to their mobile home park or the regulatory process applied to their park, that has denied them their constitutional rights. The theory of the takings claim is that by locking in a rent below market rents, and allowing tenants to sell their mobile homes to buyers who will still enjoy the benefits of the controlled rent (albeit subject to upward adjustment[10]), the ordinance shifts much of the value of ownership of the land from the landlord to the tenant. The Guggenheims submitted an expert's report with the summary judgment papers explaining that rents for sites in their mobile home park would average about $13,000 a year without

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city must "immediately" and "prior to performing any other official act" adopt an ordinance maintaining the effectiveness of all county ordinances, so it may be that, were it not for the stipulation, there would be an arguable question whether there was any gap.

9 These claims include a substantive due process claim, damages for the deprivation of constitutional rights, an equal protection claim, violations of the California state constitution, and a variety of other claims not at issue here. The federal constitutional claims are brought under 42 U.S.C. § 1983.

10 Park owners can automatically raise rent by 75% of the local consumer price index (a measure of inflation), and may seek additional increases for various reasons provided in the ordinance. Goleta, Cal., Mun. Code § 08.14.050.

rent control, but average less than $3,300 with rent control, and that the tenants could sell their mobile homes for around an average of $14,000 without rent control, but because of rent control, the average mobile home in the park sells for roughly $120,000. Since the Guggenheims lost on summary judgment, we assume for purposes of decision that this is correct.

The case went through a complex procedural course, but the complexities are of no importance here. First the case in federal court was stayed pursuant to *Pullman*[11] abstention while the Guggenheims pursued claims in state court. They and the City settled the state case. Returning to federal court, the Guggenheims won summary judgment, and the City appealed. While the appeal was pending, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*,[12] and the Guggenheims and the City agreed that *Lingle* so undermined the district court judgment that they stipulated to dismiss the appeal and they reopened the litigation in district court. This time the City won summary judgment, and the Guggenheims appeal. The district court observed that the Guggenheims "got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent-control ordinance." We reversed,[13] but de-

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[11] *See Railroad Comm. of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941).

[12] 544 U.S. 528 (2005).

[13] *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009).

cided to rehear the case en banc,[14] and now vacate our earlier decision and affirm.

II. Analysis

We review a grant of summary judgment de novo.[15] The Guggenheims' challenge is to the 2002 City of Goleta ordinance adopting the county rent control ordinance, and its readoption within the 120-day period.

A. Jurisdiction

[1] The City does not dispute jurisdiction, but we raised the issues of standing and ripeness *sua sponte* in our panel decision.[16] The Guggenheims have claimed an injury in fact to themselves (deprivation of much of the value of their land), which is fairly traceable to Goleta's rent control ordinance, and is redressable by a decision in their favor, so they do indeed have standing to maintain their challenge to the 2002 ordinances.[17]

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[14] *Guggenheim v. City of Goleta*, 598 F.3d 1061 (9th Cir. 2010).

[15] *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001).

[16] *Guggenheim*, 582 F.3d at 1004 n. 4.

[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121-22 (9th Cir. 2009) (quoting *Lujan*); *see also Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 (9th Cir. 2008) (holding that a property owner must own the affected property at the time the land use regulation is enacted to have standing to bring a facial regulatory takings claim); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by WMX Techs. Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (same).

They owned the land in 2002 when the City of Goleta promulgated the 2002 ordinances.

Ripeness is more complicated, because of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[18] In *Williamson,* the Supreme Court imposed two ripeness requirements on federal takings claims. First, a regulatory takings claim is not ripe until the appropriate administrative agency has made a final decision on how the regulation will be applied to the property at issue.[19] That requirement has no application to this facial challenge. "Facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation.[20] Second, a property owner who sues for inverse condemnation, claiming that his property was taken without just compensation, generally must seek that compensation through the procedures provided by the state before bringing a federal suit.[21]

In *Yee v. City of Escondido*, another California mobile home rent control case, the Court held that although an "as applied" challenge would have been unripe because the park owner had not sought permission to increase rents from the administrative body established by the ordinance, the facial challenge by the park owners was indeed ripe, because it

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[18] 473 U.S. 172 (1985).

[19] *Id.* at 192-93; *see also Equity Lifestyle*, 548 F.3d at 1190.

[20] *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003).

[21] *Williamson*, 473 U.S. at 195; *Equity Lifestyle*, 548 F.3d at 1190.

did not depend on the extent to which they were deprived of the economic use of their property or the extent to which they were compensated.[22] Subsequently in *Suitum v. Tahoe Regional Planning Agency*, the Court described the *Williamson* ripeness requirements as "prudential" rather than jurisdictional in the context of regulatory takings case.[23] In *Adam Brothers Farming, Inc. v. County of Santa Barbara*, we held that we had discretion to waive the *Williamson* exhaustion requirement where the case raised only prudential ripeness concerns, and did so, assuming without deciding that the takings claim was ripe.[24] In so doing, we applied *McClung v. City of Sumner*.[25] In *McClung* we had also interpreted *Suitum* as describing *Williamson* ripeness as prudential rather than jurisdictional, and concluded that "we need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional."[26]

That is not to suggest that *Williamson* is dead. In *Ventura Mobilehome Communities Owners Association v. City of San Buenaventura*, we held that the only cognizable claim raised was an as applied challenge, so held that it was properly dismissed as unripe.[27] And in *Sinclair Oil Corp. v. County of Santa Barbara*, we held that while as applied challenges required *Williamson* exhaustion, facial challenges

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22 503 U.S. 519, 533-34 (1992).

23 520 U.S. 725, 733-34 (1997).

24 604 F.3d 1142, 1147-48 (9th Cir. 2010).

25 548 F.3d 1219 (9th Cir. 2008).

26 *Id.* at 1224.

27 371 F.3d 1046, 1052-54 (9th Cir. 2004).

sometimes did and sometimes did not.[28] A complication that makes it especially difficult to determine the continuing viability of our ripeness precedents is that many involve "substantially advances legitimate state interests" claims under *Agins v. City of Tiburon*,[29] and *Agins* was overruled by *Lingle*.[30] Indeed, in the case before us, *Agins* was the law during state proceedings, and *Lingle* did not come down until the first appeal was pending in federal court. It may be that a claim (even a facial claim), alleging a regulatory taking based on the theory that an ordinance takes property without just compensation, is unripe until that property owner has sought compensation through such state proceedings as may be available. But under *Suitum* this ripeness requirement now appears to be prudential rather than jurisdictional.

[2] In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court. Two factors persuade us to follow this course. First, we reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation. Second, the Guggenheims did indeed litigate in state court, and they and the City of Goleta settled in state court. Unfortunately the law changed after their trip to state court, so they might well have proceeded differently there had they been there after *Lingle* came down, but it is

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[28] 96 F.3d 401, 406-07 (9th Cir. 1996).

[29] 447 U.S. 255, 260 (1980).

[30] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

hard to see any value in forcing a second trip on them.

B. *Penn Central* and *Palazzolo*

[3] The Guggenheims challenge only the 2002 City of Goleta ordinance, not the 1979 or 1987 County of Santa Barbara ordinances. The fundamental weakness of the dissent is its blending of the economic effects of all three ordinances, even though challenges to the first two have long been barred and are not asserted. There is a big problem with challenging as a taking the government's failure to repeal a long existing law. The County ordinances were both promulgated long before the Guggenheims bought their land, and the rent control regime created by the county ordinances limited the value of the land when the Guggenheims bought it. The Guggenheims assert no claim against the County of Santa Barbara, just the City of Goleta. They frame their challenge narrowly, solely as a facial challenge to the City of Goleta ordinance promulgated in 2002. And they argue that their facial challenge should be evaluated under *Penn Central Transportation Co. v. New York City*.[31] We assume, without deciding, that a facial challenge can be made under *Penn Central*.[32]

Palazzolo v. Rhode Island[33] is of no help to the Guggenheims. They do not have the problem that

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[31] 438 U.S. 104 (1977).

[32] *See Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 334 (2002) ("[I]f petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.").

[33] 533 U.S. 604, 627-28 (2001).

Palazzolo solved. In *Palazzolo* the taking was from the first owner and the "as applied" lawsuit was by the second. The transfer was by operation of law, during the period when the owner was ripening the claim by exhausting state remedies.[34] One reason why these distinctions matter is that even though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation.

[4] *Palazzolo* holds that an owner who acquires title to property during the period required for an as applied regulatory taking to ripen (in that case during proceedings on applications to build on wetlands) is not necessarily barred from bringing the action when it ripens even though he did not own the property when the regulation first started to be applied to the property.[35] This difference matters because an as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title

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[34] *Id.* at 614.

[35] *Id.* at 628 ("A challenge to a land use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

transfers during the ripening period not bar the action. By contrast, there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted.

[5] The Guggenheims, unlike the owner in *Palazzolo*, have owned the mobile home park at all relevant times. The Guggenheims owned during, before, and after adoption of the two City of Goleta ordinances they challenge, both upon incorporation and within the 120-day period. *Palazzolo* does not revive a challenge to the 1979 and 1987 county ordinances,[36] and the Guggenheims do not make one. Thus whatever wrongs the 1979 and 1987 county ordinances may have done to whoever owned the mobile home park then, those wrongs are not before us.

And the Guggenheims carefully limit their challenge to a facial one, not an as applied challenge. By so doing, they reserve the possibility of an as applied challenge if at some subsequent time the City of Goleta's arbitrator denies them a fair rent increase.[37] If the rent control scheme effects an unconstitutional taking when applied, the challenge will be to that application, not to the ordinance on its face, and the

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[36] *Daniel v. County of Santa Barbara*, 288 F.3d 375, 384 (9th Cir. 2002). We have also rejected the argument that *Palazzolo* "eliminat[es] any statute of limitations requirement." *Equity Lifestyle*, 548 F.3d at 1193 n.15.

[37] We do not address whether the limitation on the amount by which rents can increase and the provisions for arbitration of rent increases may work a taking, because that cannot be determined until these limitations are applied. That we reject the facial challenge has no bearing one way or the other on whether an as applied challenge might succeed.

time for the challenge will run from when the administrative action became final as opposed to when the ordinance was enacted. It is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment.

As we held in *Levald, Inc. v. City of Palm Desert*, "[i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed."[38] Nor does it matter that a challenge might not have been worth making in 1979 or 1987 when property values were lower, but became worth making when the housing bubble inflated many prices. As *Levald* stated, "while the rising property values may be relevant to an as-applied challenge, they are not relevant to a claim that the very enactment of the statute effected a taking."[39]

[6] But this is not to say that passage of the county ordinances in 1979 and 1987 can be ignored. It is central. *Yee v. City of Escondido*[40] holds that a takings challenge to mobile home rent control ordinance materially similar to Goleta's should be analyzed as a regulatory taking under *Penn Central*, not a physical occupation amounting to a per se taking as in *Loretto v. Teleprompter Manhattan CATV Corp*.[41] *Lingle* explains *Penn Central* as identifying

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[38] 998 F.2d 680, 688 (9th Cir. 1993).

[39] *Id.*

[40] 503 U.S. 519, 532 (1992).

[41] 458 U.S. 419 (1982).

several factors, not a set formula, to determine whether a regulatory action is "functionally equivalent to the classic taking."[42] "Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[43] *Lingle* points out that the character of the government action may also be relevant,[44] but this cuts against the Guggenheims because the government action here is a continuation of an old ordinance. The case before us turns on the "primary" factor.

[7] That "primary factor," "the extent to which the regulation has interfered with distinct investment-backed expectations," is fatal to the Guggenheims' claim. We assume for purposes of discussion (since the Guggenheims' summary judgment evidence would so establish) that the rent control ordinance, unchanged since 1987, did indeed transfer about $10,000 a year in rent for the average mobile home owner from the landlord to the tenant, and that this has had the effect of raising the price of the average mobile home from $14,000 to $120,000. That had happened before the Guggenheims bought the mobile home park. Since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer.

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[42] *Lingle*, 544 U.S. at 539.

[43] *Id.* at 538-39 (internal editorial and quotation marks omitted).

[44] *Id.* at 539.

[8] They could have no "distinct investment-backed expectations" that they would obtain illegal amounts of rent. To "expect" can mean to anticipate or look forward to, but it can also mean "to consider probable or certain," and "distinct" means capable of being easily perceived, or characterized by individualizing qualities.[45] "Distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. A landlord buys land burdened by leaseholds in order to acquire a stream of income from rents and the possibility of increased rents or resale value in the future. The stream already suffered a reduced flow when the Guggenheims bought it, so what they paid would reflect the flow that the law allowed. The Guggenheims might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action. But that premium could be no more than a speculative possibility, not an "expectation." Speculative possibilities of windfalls do not amount to "distinct investment-backed expectations," unless they are shown to be probable enough materially to affect the price.[46] The

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[45] *Webster's Third New International Dictionary* 658, 799 (1981).

[46] The dissent suggests that any speculative possibility, including the speculative possibility that a long existing law might change, should be enough to give rise to a takings claim if that speculative possibility is cut off. Thus, under the dissent's approach, if a statute prohibiting some land use were converted into a state constitutional amendment, the identical language in the constitutional amendment would amount to a

idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting. The Guggenheims bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had.

The Guggenheims and the City of Goleta stipulated that there was a period of time when their mobile home park was free of rent control. That was the period of hours after "organization" of the City of Goleta and, "prior to performing any other official act."[47] This period could not have given rise to a reasonable investment-backed expectation, because the Guggenheims had already made their investment years before, and even if they had bought the mobile home park during those few hours, they would have known that Goleta's first official act would, under controlling law, have to be adoption of the county's rent control ordinance.

The Guggenheims also argue that the 120-day period when the rent control ordinance would be

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taking, because it reduced the speculative possibility that the law might be repealed.

It is one thing to speculate that the value of your land might change based on market demand; it is another to gamble that a stable law may be repealed or nullified. While there is always some possibility that the law may change, and the dissent suggests that possibility may be especially great in California, that possibility ought generally to be deemed too slight to give rise to a takings claim when the law is reenacted rather than repealed.

[47] *See* Cal. Gov't Code § 57376(a).

terminated unless readopted gave them a reasonable expectation that it would not be readopted. This argument too fails to account for the fact that their investment had already been made, years before. And even if it had been made during the 120 days, it is not as though the ordinance was in limbo during that period. The rent control ordinance was the law. Though the city might choose to let the ordinance lapse instead of readopting it, that possibility was as speculative as the possibility that the city might end rent control after the 120-day period. This speculation is less than an expectation.

Lingle holds that *Penn Central*, though not establishing a set formula, identifies significant factors, "the economic effect on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred."[48] The character of the government action does not help the Guggenheims. The City of Goleta did not adjust the benefits and burdens of economic life, it left them as they had been for many years.

Whatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in the Guggenheims' chain of title. The Guggenheims

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[48] *Lingle*, 544 U.S. at 538-39 (internal editorial and quotation marks omitted).

doubtless paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream. The 2002 City of Goleta adoption by reference of the Santa Barbara County ordinance did not transfer wealth from them to their tenants. That transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants.

[9] The people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who bought their mobile homes after rent control went into effect. Ending rent control would be a windfall to the Guggenheims, and a disaster for tenants who bought their mobile homes after rent control was imposed in the 70's and 80's. Tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The present tenants lost nothing on account of the City's reinstitution of the County ordinance. But they would lose, on average, over $100,000 each if the rent control ordinance were repealed. The tenants who purchased during the rent control regime have invested an average of over $100,000 each in reliance on the stability of government policy.[49] Leaving the

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[49] We do not imply that a change in government policy amounts to a taking from the beneficiaries. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) (holding that "[r]easonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation

ordinance in place impairs no investment-backed expectations of the Guggenheims, but nullifying it would destroy the value these tenants thought they were buying.

C. Equal Protection and Due Process Claims

The Guggenheims make two other arguments, that the ordinance denies them substantive due process because it does not assure them a fair return on their investment, and that it denies them equal protection of the law because it treats mobile home park owners differently from other landlords.

[10] Due process claims can succeed when a rent control ordinance fails to substantially further a legitimate government interest.[50] The dissent argues that this ordinance did not achieve its purpose because it fails to control the price of sublets. It is true that the rent control ordinance at issue here does not control the rental price of a mobile home for occupants such as subletters. It controls the rental price of the land on which the mobile home is situated. This is in keeping with the purpose of the ordinance, which is not just to lower rents, but to "alleviate the hardship" to mobile home owners caused by "the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and

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[Footnote continued from previous page]

of such expectations cannot give rise to a Fifth Amendment claim.").

[50] *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997).

the substantial investment of mobilehome owners in such homes."[51] The ordinance protects mobile home owners, not all renters. Such a purpose does not protect mobile home renters from all market increases in the value of occupancy. It protects owners of mobile homes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land. This is a legitimate government purpose, related to but distinct from lowering housing prices for all renters.

[11] Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis.[52] Students in Economics 101 have for many decades

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[51] Goleta, Cal., Mun. Code § 08.14.010.

[52] *See Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare"); *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008) ("The Supreme Court and this Circuit have upheld rent control laws as rationally related to a *legitimate public purpose*."); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by WMX Techs. Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) ("A generally applicable rent-control ordinance will survive a substantive due process challenge if it is 'designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances.' ").

learned that rent control causes the higher rents and scarcity it is meant to alleviate,[53] but the Due Process Clause does not empower courts to impose sound economic principles on political bodies.[54]

[12] The Guggenheims' equal protection theory is also foreclosed by precedent,[55] and would have no force even if it were not, because only a rational basis is needed for this ordinance, and mobile parks differ from most other property in the separation of ownership of the land from the improvements affixed to the land. It is possible that application of the ordinance by the arbitrator will violate substantive or procedural due process requirements, but that remains to be seen, if at all, in an as applied challenge to its application.

AFFIRMED.

BEA, Circuit Judge, dissenting, joined by KOZINSKI, Chief Judge, and IKUTA, Circuit Judge:

I must respectfully dissent for two reasons.

First, because the majority misapplies the Supreme Court's analysis of regulatory takings claims. It ignores two essential elements of that analysis, and fails to follow the Court's instructions on the one

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[53] *See*, *e.g.*, William J. Baumol & Alan S. Blinder, ECONOMICS: PRINCIPLES AND POLICY 64-67 (2d ed. 1982).

[54] *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

[55] *Equity Lifestyle*, 548 F.3d at 1195 (9th Cir. 2008) ("This equal protection challenge must be considered under rational basis review because mobilehome park owners are not a suspect class.").

element it uses to disqualify the claim. The majority impermissibly picks out only one of the three factors the Court has told us to consider in determining whether a regulation effects a taking under the *Penn Central* test—whether the claimant had "distinct investment-backed expectations"—and inexplicably disdains the other two. This converts a three-factor balancing test into a "one-strike-you're-out" checklist. Not content to rewrite one binding precedent, the majority ignores the Court's recent holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

Second, because it decides the substantive due process and equal protection claims by citing rent control cases. But, the Goleta ordinance is not a rent control law for the simple reason that it is not designed to—nor does it—control rents. It does not just miss the mark because of unintended consequences or inefficient administration. Its very structure was designed and intended not to provide housing rent control, but to transfer wealth from mobile home park owners to one group of lucky tenants. The measure we deal with here is a wealth transfer, pure and simple, with none of the features of rent control thought legitimate governmental interests. As such, its enforcement violates due process and equal protection.

I. Background

Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Guggenheims"), appeal the district court's grant of summary judgment in favor of the City of Goleta. The

Guggenheims own the land on which mobile homes sit. In 2002, the City of Goleta adopted a mobile home rent control ordinance. The Ordinance capped the rate of annual rent the Guggenheims could charge for the mobile home lots, and provided for a maximum of 10% rent increases upon the sale of the mobile home to a new tenant. Importantly, the Ordinance provided no cap on the amount mobile home owners could charge when leasing or selling the actual mobile home.

The Guggenheims brought suit alleging the Ordinance constituted a regulatory taking, thus entitling them to just compensation under the Fifth and Fourteenth Amendments. The Guggenheims also alleged due process and equal protection claims. Although the Guggenheims presented evidence that the Ordinance effects a wealth transfer from the mobile home land owners to the lucky, "windfall tenants" who held tenancies at the time of the enactment of the Ordinance, and that the Ordinance is not written in such a way as to effect a legitimate state interest—such as providing affordable housing to low income people—the district court granted summary judgment against them.[1]

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[1] We review the district court's order granting summary judgment in favor of the City *de novo*. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). We "must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002).

II. Takings Clause

Claiming to apply the three-factor test from *Penn Central*, the en banc majority opinion holds as a matter of law that the Guggenheims cannot establish the mobile home rent control ordinance effects a regulatory taking of its property for public use within the meaning of the Fifth Amendment, as applied to Goleta through the Fourteenth Amendment. The majority's principal error is its finding, as a matter of law, that the Ordinance could not interfere with the Guggenheims' "distinct investment-backed expectations" of freeing their land from "rent control." Maj. Op. at 20434. The majority reaches this conclusion only by adopting a view of the law and of the economic effects of the Goleta ordinance that is static and provides no opportunity for change or innovation. While attractive for its simplicity, such stasis does not reflect the world in which we live, nor the teachings of the Court.

In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), the Court set forth the three factors that must be considered in determining whether a regulation effects a taking: (1) the economic impact of the regulation on the claimant; (2) the character of the government's action; and (3) the extent to which the regulation interferes with the claimant's investment-backed expectations. *Id.* at 124. The majority opinion deals only with the last factor, as if *Penn Central* established a "one-strike-you're-out" checklist for knocking property owners out of court, rather than a three-factor balancing test in which each factor *must* be considered. No one factor is "talismanic," Justice O'Connor said in *Palazzolo* when she criticized the state supreme court for "elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dis-

positive status.' " *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). The extent of interference with investment-backed expectations instead "is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.' " *Id.* (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Since *Penn Central* requires all factors be considered, that is what I shall do. Each of these factors militates in favor of finding that Goleta's so-called rent control ordinance (the "Ordinance") effected a regulatory taking.

A. The Economic Impact of the Ordinance

> Primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.

Lingle v. Chevron, 544 U.S. 528, 538-39 (2005) (internal quotation marks omitted).[2]

The majority opinion settles on the factor of "distinct investment-backed expectations," but fails to provide any analysis of the general economic impact

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[2] In *Lingle*, an oil company brought suit under the Fifth and Fourteenth Amendments challenging a Hawaii statute which limited the rent oil companies could charge dealers to lease company-owned service stations. Applying *Agins v. City of Tiburon*, 447 U.S. 255 (1980)—in which the Supreme Court declared that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests—the District Court held that the rent cap effected a taking. The Ninth Circuit affirmed. The Supreme Court reversed and remanded, holding that *Agins*' "substantially advances" test is not a valid takings test. *Lingle*, 544 U.S. at 548.

of the Goleta Ordinance on the claimant.[3] Let's provide that analysis.

The Guggenheims presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land—nearly all of which value is effectively transferred to the original tenants by enactment of the Ordinance. The Ordinance limits the amount by which rents on the mobile home pads may be increased to 75% of the Consumer Price Index, plus an additional amount to pass through increased operating costs, capital expenses, and capital improvements. Ordinance §§ 11A-5, 11A-6. The Ordinance also contains a vacancy control provision, which limits to 10% the permissible rent increase on the mobile home pad when a mobile home unit changes ownership. *Id.* § 11A-14. The parties and the district court did not dispute that the Ordinance seriously impacted the value of the Guggenheims' property:

> During the time that [the Guggenheims] have owned the Park, housing costs in the

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[3] I am puzzled, but grateful, to learn what the majority thinks is the fundamental weakness of this dissent: "[the] blending of the economic effects on the Guggenheims of all three ordinances." Maj. Op. at 20431.

Puzzled, because there are no economic effects on the Guggenheims from the two previously-enacted ordinances: the Santa Barbara 1979 and 1987 ordinances. Since Goleta incorporated itself into a city in 2002, only the 2002 Goleta ordinance imposes price control on the land the Guggenheims rent out. Indeed, the majority acknowledges it is only the 2002 ordinance which the Guggenheims challenge. Maj. Op. at 20431.

Grateful, to learn that I need not worry about the economic effects of the Santa Barbara ordinance; neither do the Guggenheims.

> City have increased approximately 225%. Because of the rent-control ordinance, the rents charged by [the park owners] have not kept pace with this increase . . . existence of lower-than-market value rents has resulted in the ability of mobilehome owners to sell their homes at a significant premium [the "transfer premium"]. According to the analysis of [the Guggenheims'] expert, based on the sale of 64 mobile homes from January 15, 1999 through July 21, 2004, the premium amounted to, on average, 88% of the sale price. In other words, an average mobile home worth $12,000 would sell for approximately $100,000.

As outlined in the report by the Guggenheims' expert, Dr. Quigley[4], and accepted by the district court, the Ordinance required the Guggenheims to rent all Park mobile home pad spaces at approximately 20% of their market value.[5] The market price of a mobile home increases when the rent the homeowner pays for space in a mobile home park decreases. Dr. Quigley estimated that, on average, almost 90% of a mobile home's sale price represented the value of the lower rents set by the Ordinance, and this premium went into the pockets of the tenants incumbent at

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[4] Dr. Quigley is a professor of economics, business, and policy at the University of California, Berkeley. *See* Carl Mason & John M. Quigley, *The Curious Institution of Mobile Home Rent Control*, 16 J. Housing Econ. 189, 189 (2007).

[5] Of course, as the years go by, and if housing costs increase, this 80% disparity between market and regulated rents will increase and the magnitude of the Ordinance's economic impact will grow.

the time of the Ordinance's enactment, hereafter the "windfall tenants."

There is no authority for the proposition relied on by the district court that a taking has not occurred when the complaining party continues to receive some return on investment. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that an exaction of 96% of the property's return on equity was severe enough to constitute a taking under *Penn Central*). The *Penn Central* test looks at the severity of the economic burden, and a finder of fact could easily determine that a loss of 80% of the market value of property is just such a severe economic burden, even though the property owner receives *some* return on investment. In *Penn Central*, the Court held that enforcement of a landmark preservation ordinance to bar construction of a fifty-story office building was not a regulatory taking because the restricted airspace rights could be transferred to other parcels owned by the litigant; the option of constructing an office building at those other locations reduced the economic impact of the regulation. *Penn Central*, 438 U.S. at 137. But the Guggenheims are not so positioned: (1) they have no other lots, and (2) if they had, there is no benefit under the Ordinance which they could transfer to such lots. Moreover, the *Penn Central* landmark ordinance was generally-applicable to all types of property owners and barred only expansions of existing uses.

Further, California imposes considerable obstacles to alternate uses of the mobile home park. To convert the park to any other use, the Guggenheims must obtain approval of their plan from the city council. Cal. Gov. Code § 66427.5(e). As part of the approval process, they must file a plan outlining the

new use to which the property will be put and detailing the impact of the conversion on existing residents, and also conduct a "survey of support of residents . . . . pursuant to a written ballot," the results of which must be submitted along with the application and may be taken into account by the city council when it votes on the conversion plan. *Id.* § 66427.5(b), (d); *see Colony Cove Props., LLC v. City of Carson*, 114 Cal. Rptr. 3d 822, 835 (Cal. Ct. App. 2010). Additionally, because the cost of the Ordinance is borne solely by mobile home park owners—and not lessors of other housing—its economic impact on those park owners is more severe than a broad-based housing regulation. This factor favors finding a "taking" has occurred.

B. Investment-Backed Expectations of All the Park Owners

The majority opinion holds that the determinative *Penn Central* factor must be the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and that factor "is fatal to the Guggenheims' claim." Maj. Op. at 20434. In addition to avoiding the question of how a single factor in a three-factor test could be "fatal" without consideration or balancing of the other factors,[6] this holding is incorrect for three reasons.

First, the majority opinion holds, as a matter of law, that the Guggenheims cannot have investment-backed expectations of freeing their land from the rent control ordinance because they knew the regulation was in effect when they purchased the mobile

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[6] Justice O'Connor made this precise point in her concurrence in *Palazzolo*, *supra* at p. 20443.

home park. This could be a logical conclusion to reach—but only were one to ignore (1) the instructions of the Supreme Court, (2) decades of political, legal, and economic developments, and (3) the actions of the Guggenheims.

First, the Supreme Court has specifically held that the fact claimants knew of a land-use regulation at the time they took title to their land does *not* bar them from challenging that regulation, nor from contending that the ordinance lessened the value of their land by interference with their investment-backed expectations.

> Were we to accept the State's rule [that appellants had no investment-backed expectations because the ordinance was enacted before they purchased the land], the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. *A State would be allowed, in effect, to put an expiration date on the Takings Clause*. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627 (emphasis added). In his concurrence, Justice Scalia was even more explicit in criticizing the methodology employed by the majority here:

> In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The 'investment-backed expectations' that the law will

> take into account *do not include the assumed validity of a restriction* that in fact deprives property of so much of its value as to be unconstitutional.

Id. at 637 (Scalia, J., concurring) (emphasis added) (internal citation omitted). The majority's dismissal of the Guggenheim's investment-backed expectations, on the basis that they knew what they were getting into, directly contravenes Supreme Court precedent and assumes the eternal validity, without reform, of the so-called rent control ordinance.[7] It

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[7] Not only does *Palazzolo* recognize the Guggenheims' ability to bring a takings claim on the basis of their own reasonable investment-backed expectations, but it also acknowledges the ability of a land owner to bring a regulatory takings action for a loss in value that was suffered by a previous land owner. As *Palazzolo* points out, the government is not absolved of its obligation to defend actions restricting land use, merely on account of a postenactment transfer of title. 533 U.S. at 627. A rule barring land owners from challenging ordinances that were enacted during a previous landowner's tenure, the Court explained, "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself." *Id.* Consequently, the panel majority's observation that any unfairness attributable to the rent control ordinance "was imposed long ago[ ] on someone earlier in the Guggenheims' chain of title," is unavailing. Maj. Op. at 20437. *Palazzolo* makes clear that to the extent a previous landowner had the right to bring a regulatory takings challenge against an ordinance enacted during its tenure, successive landowners enjoy the same right. 533 U.S. at 627. Thus, even though the ordinance at issue effected a wealth transfer from the previous land owner to tenants in 1979 and 1987, which wealth transfer is kept in place by the 2002 Goleta ordinance, the Guggenheims may challenge the ordinance and seek recovery on the basis of the previous land owner's loss. *Id.* That loss is passed on to the

does not come as a surprise the majority's stance on this subject comes without legal authority.

The majority opinion asserts that *Palazzolo* "is of no help to the Guggenheims," Maj. Op. at 20431, but one is puzzled by its attempts to distinguish *Palazzolo*. The majority notes that the claimant in *Palazzolo* challenged the land-use regulation as it was applied to him, whereas here, the Guggenheims bring a facial challenge to the Ordinance. *Id.* at 20431. So? *Penn Central* involved an as-applied challenge; but it gave us rules of general application as to what constitutes a regulatory taking.[8] Next, the majority points out the transfer in *Palazzolo* was by operation of law (the claimant, as controlling shareholder of the corporation which owned the land, acquired the property when the corporation dissolved), whereas the Guggenheims purchased the mobile home park on the open market. So? The plaintiff in *Palazzolo* acquired title after the challenged land-use restriction was enacted and nonetheless prevailed without claiming that he should be considered to have become the owner when his corporation bought the land before the restriction's enactment, on some theory of advantageous piercing of the corporate veil *cum* relation back. These "distinctions" are mere differences, no more significant than that the Palazzolo

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[Footnote continued from previous page]

Guggenheims as an incident of property ownership. In accounting terms, it is a transferable contingent asset.

8 *See Lingle*, 544 U.S. at 539 (calling the *Penn Central* factors the "principal guidelines for resolving regulatory takings claims"); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1032-33 (9th Cir. 2000) (describing the facial challenge addressed in *Lingle*).

land was in Rhode Island[9] and the Guggenheim land was in California.

Tellingly, the majority opinion provides no justification or legal support for why these proposed distinctions matter. Why should the investment-backed expectations of a land owner bringing a facial challenge be analyzed differently from those of an as-applied claimant? If the *expectations* are valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations, or they aren't. Likewise, the majority opinion provides no justification, legal or otherwise, for limiting the broad language of *Palazzolo* to the type of transaction that vests title.

But this misprism of Supreme Court precedent is made worse by the majority opinion's failure to recognize specific evidence of the Guggenheims' investment-backed (after all, the Guggenheims invested money to buy the property) expectations. As the Court noted in *Palazzolo*, a court should analyze the claimant's investment-backed expectations as if the regulation at issue could be repealed at any time. *Id.* at 637. Here, the Guggenheims purchased the mobile home park with the apparent belief they could free the land from the Ordinance, either through administrative action, political lobbying, or court action. After buying the property in 1997, they applied for a variance from the zoning commission, which variance could exempt their land from the Ordi-

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[9] Where he was up against a more formidable and resourceful takings opponent: the State of Rhode Island and Providence Plantations. Here, the Guggenheims face the town of Goleta.

nance.[10] The application was denied. They subsequently instituted this court action to have the Ordinance declared facially unconstitutional under the Fifth Amendment.[11]

The majority opinion even acknowledges the possibility of rent control repeal or reform by conceding that "[t]he Guggenheims might conceivably have

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[10] Although the Guggenheims did not need to seek a land-use variance to bring their facial challenge to the Ordinance, *see Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996), the fact that they applied for such a variance immediately after purchasing the mobile home park is objective evidence that they had at least some investment-backed expectations they could free the land from the Ordinance. Reference to such administrative action is made to strengthen that prong of the Guggenheims' regulatory taking claim, and should not suggest any uncertainty as to whether this is an as-applied or facial challenge; this is indisputably a facial challenge.

[11] The Guggenheims' complaint contains further description of their efforts to contest the validity of the rent control ordinance and prevent its application to their mobile home park.

> Prior to the incorporation of the City, Plaintiffs unsuccessfully attempted to meet with City officials-elect to discuss the City's adoption of the mobilehome rent control provisions of the Orindance [sic]. In addition, Plaintiffs caused to be sent to the City Attorney-elect, a proposed ordinance that stayed the City's enforcement and the effectiveness of the newly adopted Ordinance relating to the vacancy control provision of mobilehome rent control and specifically the limitation of the adjustment of rents upon the sale of a mobilehome, i.e., vacancy control. Plaintiffs applied to the City for relief from the vacancy control restriction in the Ordinance. . . . Defendant's City Council considered adoption of the proposed moratorium and rejected it.

Guggenheim Complaint at ¶¶ 6-7.

paid a speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." Maj. Op. at 20435. But, the majority dismisses this contention as a "speculative possibility, not an 'expectation,'" *id.* at 20435, without any citation of authority as to why a "speculative possibility is not an expectation, nor why a judge, not a jury, should determine whether there was such an "expectation." The majority opinion flatly states (without a citation to any case, statute, or even a law review article) that "speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough materially to affect the price." *Id.* at 20435. However, this self-supporting, self-defining language ignores the actual dictionary definition of "speculate." As defined by Webster's New 20th Century Unabridged Dictionary (1979), one meaning of "speculate" is precisely "to buy or sell *land* hoping to take advantage of an *expected* rise or fall in price." (emphasis added). Having determined that they might be able to free their mobile home park from the Ordinance, the Guggenheims bought the land based on these investment-backed expectations—expectations which influenced the price they were willing to pay for the property as well as their expected rate of return on the investment.

The Guggenheims' beliefs regarding the possibility of freeing their land from the Ordinance were not self-indulgent delusions, or "starry eyed hope of winning the jackpot if the law changes," as the majority terms it. Maj. Op. at 20435. Their beliefs were at least plausible in light of contemporary legal, political, and academic thought. In the modern economic

marketplace, the spectre of legal uncertainty haunts every commercial transaction and influences each party's valuation of the assets involved. For example, the validity of a pharmaceutical company's patent will affect that company's value as a potential acquisition target. Legal uncertainty over rent control has been particularly marked in California. In 1989 the state amended its Mobilehome Residency Law to exempt all *new* construction from local control. Cal. Civ. Code § 798.45. Less than two years before the Guggenheims purchased their property, California had abolished vacancy control for rental apartments statewide. Costa-Hawkins Rental Housing Act, § 1, 1995 Cal. Legis. Serv. 331 (A.B. 1164) (West) (codified at Cal. Civ. Code § 1954.50-.53). In January 1999, Santa Monica reformed its strict rent control ordinance, repealing its operation as to any new tenants. Tierra Properties, *Santa Monica: A Case Study in Growth and Rent Control* (1999).

The Guggenheims and the prior owners of their mobile home park may have reasonably thought that the state would abolish rent control—or at least vacancy control—for mobile home parks. And the Guggenheims could reasonably retain those expectations today, as recent efforts to repeal rent control in California have garnered significant support. For example, a 2008 ballot proposition to phase out rent control won almost 40% of the votes cast. Patrick McGreevy, *Prop. 98 Backers Seek Eminent Domain Limits*, L.A. Times, June 5, 2008, at 1.

Moreover, mobile home rent control ordinances have been heavily criticized in academia as an inefficient method for providing affordable housing to low and middle-income households. *See*, *e.g.*, Mason & Quigley, 16 J. Housing Econ. at 192, 205 (concluding that "housing is no more "affordable" [to subsequent

tenants] afterwards than it was before the ordinance was adopted," and that "virtually all of the economic benefits from lower regulated rents are paid out annually to finance the higher sales prices commanded by those dwellings").

Given the instances of actual or attempted repeal and reform of rent control ordinances across the country, the particular scrutiny paid to the issue in California, and the criticism of mobile home rent control in the academic literature, the Guggenheims had a reasonable expectation—or at least, a trier of fact could reasonably find they had such an expectation—that they could free their land from the Ordinance either through the grant of a zoning variance, political action targeted toward repealing the regulation in its entirety, or court action to invalidate the law. This inference is supported by evidence presented to the district court that the Guggenheims pursued relief from the Ordinance through at least two of these avenues in the years following their purchase of the mobile home park. The majority readily *admits* that this investment-backed expectation could have materially affected the price the Guggenheims were willing to pay for the mobile home park. "The Guggenheims might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." Maj. Op. at 20435. At most, this concession establishes that the Guggenheims *did* in fact have investment-backed expectations of freeing the land from the Ordinance; at the very least, it raises a question of fact for the jury to decide.

Finally, the majority, perhaps sensing its vulnerability on the issue of investment-backed expecta-

tions, attempts to distract the reader by introducing an entirely irrelevant consideration into the analysis: the alleged investment-backed expectations of the mobile home *tenants*. Maj. Op. at 20437. The majority opinion paints a sympathetic portrait of subsequent tenants who purchased mobile homes at market rates, in reliance on the continued validity of the Ordinance. But, the *Penn Central* regulatory taking analysis does not apply to them for the simple reason that no government action took economic value from them or would take such value from them were the Goleta ordinance held invalid. The Takings Clause prohibits only takings, without compensation, by *government* action, not losses from the workings of the free market. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) ("Reasonable expectations arising out of past policy but without a basis in cognizable property rights . . . . cannot give rise to a [taking]."). *Moreover*, *Penn Central* does not contemplate any consideration of the expectations of other market players, or any balancing of the interests of various market players in determining whether the government has taken property. Its analysis is focused solely on the investment-backed expectations of the claimants, here, the Guggenheims.

In sum, the majority opinion ignores Supreme Court precedent by holding that a claimant cannot have investment-backed expectations if he purchases property with notice of an existing regulation, by assuming the eternal regnancy of a land-use regulation, and by introducing irrelevant considerations which tend only to confuse the regulatory taking analysis. Furthermore, the majority adopts a static and somewhat simplistic view of law, politics, and economics by failing to recognize that the Guggen-

heims had a reasonable expectation of freeing their land from the Ordinance through political or legal means, and by failing to acknowledge that this belief could influence the price they were willing to pay for the land.

The Guggenheims presented sufficient evidence to raise a triable issue of fact regarding their investment-backed expectations to survive a motion for summary judgment. The case should have gone to trial.

C. The Character of the Government's Action

The majority opinion also ignores the final *Penn Central* factor, the character of the governmental action, which likewise cuts in favor of the Guggenheims. In analyzing this factor, a court looks at the purpose of the regulation, the effect it has in practice, and the distribution and magnitude of the burdens and benefits it places on private citizens. *Penn Central*, 438 U.S. at 130-34.

The stated purpose of Goleta's mobile home rent control ordinance was to protect "owners and *occupiers* of mobile-homes from unreasonable rents" brought about by a shortage of housing and the high cost of moving mobile homes. Ordinance § 11A-1 (emphasis added). Rent control measures also have the claimed ancillary benefit of allowing stable communities to form. *See* Jay M. Zitter, *Validity, Construction, and Application of Inclusionary Zoning Ordinances and Programs*, 22 A.L.R.6th 295, § 13 (2007). However, as discussed below with regard to the substantive due process claim, this Ordinance does not serve its stated purposes because of the way it is structured and written. The Ordinance restricts only the amount the landowner can charge a tenant

for rental of the mobile home parcel; it does not limit the amount which that tenant, in turn, can demand for sale or lease of the mobile home to other owners or tenants. The designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home.

The Ordinance unquestionably places a high burden on a few private property owners instead of apportioning the burden more broadly among the tax base. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("[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."); *see also Lingle*, 544 U.S. at 542-43; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987). Similar laws concentrating the cost of affordable housing on a small group of property-owners have been found unconstitutional. In *Cienega Gardens*, developers of low-income apartments were able to secure low-interest, forty-year loans from private lenders because the Department of Housing and Urban Development provided the developers with mortgage insurance. *Cienega Gardens*, 331 F.3d at 1325. Two federal statutes eliminated the developers' contractual rights to prepay their forty-year mortgage loans after twenty-years. *Id.* at 1326-27. The purpose of the statutes was to prevent the developers from exiting the low-rent housing programs in which they were required to participate while carrying the loans, but not once they paid off the loans. *See id.* at 1323. But the statutes caused a 96% loss of return on equity for

the developers. *Id.* at 1343. The developers brought suit against the government, claiming that the federal statutes restricting their right to prepay their mortgage loans effected a regulatory taking under the Fifth Amendment.

The Federal Circuit, applying *Penn Central*, found that the character of the government action was to place the expense of low-income housing on a few private property owners (those who had previously participated in the federal loan program but now wanted to pay their way out), instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low-rent apartments. *Id.* at 1338-39.

Similarly, here it is undisputed that the Ordinance applies only to mobile home park owners. The district court found that the City did not impose such extreme costs for providing affordable housing on any other property owners in the City, except as a condition of new development. In contrast to the burden of renting all the low-rent housing property at an 80% discount, the burden on new developers was to make only 20% of their housing available at below-market rates. There is nothing in the record to suggest why the Federal Circuit's reasoning should not be applied to the facts of this case; substituting "Goleta" for "Congress":

> Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective . . .—preserving low-income housing—and method—forcing some owners to keep accepting below-market

> rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden.

331 F.3d at 1338-39. This analysis, ignored by the majority opinion, weighs heavily in favor of finding a regulatory taking under *Penn Central*.

D. Weighing the *Penn Central* Factors Shows the Guggenheims Suffered a Regulatory Taking.

The majority opinion errs in considering only one element of a three-factor, balancing test—investment-backed expectations—and making that element dispositive. It treats the factors as a requirements checklist, rather than a list of considerations to weigh, one against or with another. Further, it flouts the Supreme Court's holding in *Palazzolo* that a "postenactment transfer of title [does not] absolve the [government] of its obligation to defend" the restrictions a regulation imposes on property-owners. *Palazzolo*, 533 U.S. at 627. At a *minimum*, the case should be remanded for trial on the severity of the economic impact on the claimants, the existence of investment-backed expectations, and the character of the governmental action because these are at least mixed questions of fact and law on which reasonable triers of fact could find that there was a taking. The Guggenheims produced evidence from which a finder of fact could find that a taking had occurred: the Guggenheims bought the mobile home park with the reasonable expectation that they could free the land from the Ordinance either through a variance, repeal of the regulation, or through court action. They were forced to rent mobile homes at 20% of the current

market rate, and sit by as incumbent mobile home owners captured a transfer premium averaging approximately 90% of the sale price of their mobile homes. On summary judgment, drawing all reasonable inferences in favor of the non-moving party, the district court erred in holding, as a matter of law, that the Ordinance was not a taking. *See Ventura Packers, Inc.*, 305 F.3d at 916.

III. Substantive Due Process Claim

The Supreme Court in *Lingle* clarified the difference between a challenge to a rent control ordinance as a regulatory takings claim and as a substantive due process claim, and affirmed the independent vitality of both theories.

> [The Takings Clause] is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference. . . . Due process violations cannot be remedied under the Takings Clause, because if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Crown Point Develop., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (quoting *Lingle*, 544 U.S. at 537).

The majority opinion summarily dismisses the Guggenheims' substantive due process claim by noting that while the Ordinance may not perfectly accomplish its stated purposes, this court is bound by precedent establishing that rent control ordinances

are rationally related to a legitimate state interest. Maj. Op. at 20439. The majority opinion even cites Justice Holmes's iconic language from *Lochner*: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* n.54. And the majority might be correct if this case involved a true rent control ordinance. But, at the very least, a rent control ordinance must control rents, and Goleta's ordinance does no such thing.

The stated purpose of the Ordinance was to protect "owners and occupiers of mobilehomes from unreasonable rents," with the hope that affordable housing would create a stable population. Ordinance § 11A-1. But, the Ordinance is so structured so that it cannot achieve its designated purpose. Instead of controlling the price of rental housing, the Ordinance restricts only the amount the landowner can charge for one component of the cost of rental housing: land rent. There are no limits on the amount the "windfall tenant" and his successors as tenants or owners can charge when he in turn sub-leases or sells the mobile home to future tenants; as the housing market improves (as it did between 1997 and 2002), he has every incentive to capture that transfer premium by leasing or selling the mobile home.[12] The district court found it undisputed that this transfer premium equaled approximately 90% of the current sale price of a mobile home in the Park. As soon as the "wind-

[12] Nor can it be argued that the future effects of the Ordinance should not be considered in the due process analysis. By providing for a 10% rent increase each time a mobile home is sold, the drafters of the Ordinance clearly contemplated the future effect of the rent control ordinance on future tenants, and this fact broadens the temporal scope of this court's review.

fall tenant" leases or sells the mobile home at a premium, the stated purposes of the Ordinance are nullified: the lease or sale is at the market rate, and the turnover in tenants has already interrupted the stability of the population and the goal of "affordable" (non-market) housing.

Thus, the Ordinance does not effect rent control, but simply transfers wealth from a small group of land owners to a larger group of fortunate tenants. While the government has authority to tax or encumber citizens for the common good, it cannot violate individual rights merely to enrich a small, private interest group. As the Court held in *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655 (1874):

> To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law. . . .

Id. at 664. The burden of this wealth transfer is borne entirely by mobile park lot owners, whose property rights are taken from them based solely on the nature of their business. Owners of condominium complexes, houses, or apartment buildings are not regulated by the Ordinance, even though their rental rates will affect the overall housing market to a greater extent than mobile home owners. *See* Quigley, *supra*.

Our court has several times found a rent control ordinance that creates such windfalls for lucky tenants and does not lower prices to be unconstitutional under the theory that it failed "substantially [to] ad-

vance a legitimate state interest." *See Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 855-57 (9th Cir. 2004) (ordinance limiting the rent oil company could collect from gas station operators was unconstitutional because operators could sell their lease rights at a premium), *rev'd sub. nom. Lingle*, 544 U.S. at 545; *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (ordinance regulating condominium assessments that allowed condo sellers to capture value of the regulation by selling at a premium was unconstitutional). One panel went so far as to hold that "a [mobile home] rent control ordinance that does not on its face provide for a mechanism to prevent the capture of a premium is unconstitutional, *as a matter of law*, absent sufficient evidence of externalities rendering a premium unavailable." *Cashman v. City of Cotati*, 374 F.3d 887, 897 (9th Cir. 2004) (emphasis altered).

Of course, these were regulatory takings cases, and the Supreme Court in *Lingle* disapproved of the "substantially advances" theory as a means of bringing a *takings* claim. 544 U.S. at 540. But *Lingle* upheld the independent validity of substantive due process claims and held that ordinances creating a transfer premium might not advance a legitimate government interest. The Court indicated that the "substantially advances" test was a way to bring substantive due process claims:

> The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so

> arbitrary or irrational that it runs afoul of the Due Process Clause

Id. at 542; *see also Crown Point Dev., Inc.*, 506 F.3d at 856.

Also puzzling is the majority's assertion the Ordinance meets the legitimate purpose of alleviating the hardship to owners in the "costs of moving" mobile homes from the Goleta pads. Maj. Op. at 20439. Surely, the costs of moving a mobile home, from forklift to flatbed to "wide load" flags fluttering down the road to a new site, are the same if the mobile home is moved from a rent controlled lot or from a market controlled lot.

But perhaps what the majority means as the "costs of moving" is the increased land rent the mobile home owner may have to pay at the new location. What the majority overlooks, however, is that—unless the mobile home owner is one of the lucky original "windfall" tenants—the price he paid for his mobile home was jacked up by the present value of the difference between Goleta rent controlled land (lower) and market price rental land (higher). *See* discussion of Prof. Quigley's report, *supra* at p. 20445. If the present value of the difference between rent controlled and market land rentals is correctly reckoned in the market price of the mobile home, the only additional "costs of moving" to be incurred are indeed the costs of permits, trucking, possible damage to the unit, etc. But those costs would be incurred regardless whether the mobile home owners were moving from a rent controlled or a market rate lot. Thus, just as the Ordinance does not control rents—a point on which the majority agrees, Maj. Op. at 20438-39—it does not protect mobile

home owners from the "costs of moving," properly reckoned.

The Guggenheims do not base their substantive due process claim on Economics 101 or Herbert Spencer. *See* Maj. Op. at 20439 & n.54. To the contrary: the Guggenheims presented *undisputed* evidence that the Ordinance—by design—creates transfer premiums which increase the sublet rental or sale price of mobile homes. Such transfer premiums raise the eventual price to a Goleta tenant or buyer so that notwithstanding the Goleta-mandated lower regulated land rent he must pay, the combined cost of his land rent and mobile home sublease or purchase approximates the total housing price for similar mobile home use on unregulated land rentals outside of Goleta.

This evidence creates a genuine question as to whether the Ordinance is so ineffective at serving its stated public purpose of "providing affordable (low-cost) housing" that it is not rationally related to a legitimate state interest. Despite the great deference owed to legislative acts which do not implicate a fundamental right or suspect classification, Justice Holmes's quote from *Lochner* is not a talisman which protects all government regulations from examination and review, regardless of their structural integrity or effectiveness.

IV. Equal Protection Claim

The Guggenheims also argue that the Ordinance violates the Equal Protection Clause because it singles out mobile home park owners, as opposed to other sorts of housing providers, to bear the burden of an affordable housing program. This court has previously held that a mobile home rent control ordinance does not per se violate the Equal Protection

Clause because it is rationally related to the legitimate public interest of promoting affordable housing. *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1195 (9th Cir. 2008). *Equity Lifestyle* held that this is true even if the statute singles out mobile home owners such as the Guggenheims, does not increase the amount of available affordable housing, and "serve[s] the sole purpose of transferring the value of [the park owner's] property to a select private group of tenants." *Id.* at 1193. Such a naked transfer of wealth between two private actors, based solely on the manner in which individuals choose to use their land, violates the Equal Protection Clause. *Equity Lifestyle* should have been overruled by this en banc panel to bring our Equal Protection analysis into line with the Supreme Court's views as to takings and substantive due process.[13] As we are an en banc court, we are not bound by the "law of the circuit" rule of *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

We should reverse the district court's finding that there has been no compensable taking and no

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[13] *Pennell v. City of San Jose*, 485 U.S. 1, 13-14 (1988), which held the rent control ordinance at issue in that case was rationally related to a legitimate state interest is not contrary to our reasoning because *Pennell* involved a true rent control ordinance of rental apartments. The old tenants in that case had no power to charge the new tenants a premium over the rent controlled amount. Thus, the rent control ordinance was effective in carrying out the goal of providing affordable housing. Again, if our case involved a true rent control ordinance that was designed to be effective in attaining its goals, I would not dissent from the majority's conclusion that the Ordinance does not violate substantive due process or equal protection.

due process or equal protection violation, and remand for a trial on the merits.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; MAUREEN H. PIERCE, *Plaintiffs-Appellants,* v. CITY OF GOLETA, a municipal corporation, *Defendant-Appellee*.	No. 06-56306 D.C. No. CV-02-02478-FMC OPINION

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted
April 7, 2008—Pasadena, California

Filed September 28, 2009

Before: Alfred T. Goodwin, Andrew J. Kleinfeld, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Kleinfeld

COUNSEL

Mark D. Alpert, Robert S. Coldren (argued), and C. William Dahlin, Santa Ana, California, for the plaintiffs-appellants.

Julie Hayward Biggs and Amy E. Morgan (argued), Los Angeles, California, for defendant-appellee.

OPINION

BYBEE, Circuit Judge:

Daniel Guggenheim and others bring a facial challenge to the City of Goleta's mobile home rent control ordinance. Guggenheim argues that the ordinance, which effects a transfer of nearly 90 percent of the property value from mobile home park owners to mobile home tenants, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). We have fielded such challenges before, but have never reached the merits of the takings claim. *See, e.g.*, *Equity Lifestyle Props., Inc. v. County of San Luis Obispo* ("*Equity Lifestyle*"), 548 F.3d 1184, 1190 n. 11 (9th Cir. 2008); *Carson Harbor Vill. Ltd., v. City of Carson*, 37 F.3d 468, 475-77 (9th Cir. 1994), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-89 (9th Cir. 1993); *Sierra Lake Reserve v. City of Rocklin*, 938

F.2d 951, 955 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992).

To determine whether a taking has occurred we must decide several issues. We must first determine whether the mobile home park owners have standing to bring this case. Additionally, we must consider whether this case is ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). If so, then we must determine whether the city ordinance constitutes a regulatory taking under *Penn Central*. We also address challenges to the ordinance under the Due Process and Equal Protection Clauses.

The district court did not address either the standing or ripeness questions due to the unusual procedural history of the case, but implicitly found the case was properly brought. The district court found that no taking had occurred. For the reasons explained below, we agree with the district court that this case is properly brought and ripe for decision, but we disagree with the district court on the merits of the takings claim. Because we find that a taking has occurred, we reverse and remand to the district court to determine what compensation is due. We affirm the district court's judgment on the due process and equal protection claims.

I

A

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897), provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause "does not prohibit the taking of private property, but

instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Takings Clause was drafted so as "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315. The Takings Clause "'bar[s] 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.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

To determine whether a mobile-home rent control ordinance constitutes a taking under the Constitution, we must first understand some unique characteristics of mobile homes. "The fact that these homes can be moved does not mean that they do move." JOHN STEINBECK, TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA 96 (Penguin Books 1986) (1962). As described by the Supreme Court:

> 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. They are generally placed permanently in parks; once in place, only 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) (citation omitted).

The County of Santa Barbara, California (the "County"), first enacted its Rent Control Ordinance (the "RCO") in 1979, and amended it in 1987. In 2002, the City of Goleta incorporated within the County. As required by California law, the new City of Goleta immediately adopted by reference the County's code in its entirety, including the RCO, as its provisional new code. *See* CAL. GOV'T CODE § 57376 (2008); City of Goleta Ordinance No. 02-01. About two months later, the City readopted by reference most provisions of the County code, including the RCO, as permanent city ordinances. City of Goleta Ordinance No. 02-17.

The statement of "Purpose" in the RCO has remained unchanged since the RCO was first passed by the County in 1979. The purpose was to prevent mobile home park owners from charging exorbitant rents to exploit local housing shortages and the fact that mobile home owners could not easily move their homes:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who

> reside in rental housing . . . . Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobile home parks in the County of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, . . . the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobile home park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs.

RCO § 11A-1.[1]

The RCO limits any increases in mobile home rents on an annual basis to 75 percent of the increase in the local Consumer Price Index ("CPI"). RCO §§ 11A-5(a)(2), 11A-5(a)(3), 11A-5(g). This increase is referred to as the "automatic increase." Mobile home park owners may also increase the rent by an additional amount to pass through increased operating costs, capital expenses, and capital improvements. This increase is referred to as the "discretionary increase." RCO § 11A-5(f)(1); 11A-6. The RCO sets out an arbitration process by which park owners must

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[1] Because the City of Goleta adopted the RCO "by reference," the authoritative source of the RCO is found in the County code. *See* City of Goleta Ordinance No. 02-17 (adopting most provisions of the County code "by reference" and stating that "[w]henever 'County' or 'County of Santa Barbara' is used in the County Code . . . it shall mean the City of Goleta."). A copy of Santa Barbara's current version of the RCO may be found at http://www.bpcnet.com/codes/stbarb/, by clicking on the link titled "Chapter 11 Mobilehomes." The citations in this opinion refer to the RCO as amended in 1987.

work with the mobile home owners and an arbitrator to determine the total amount of the permissible rent increase for each year. RCO §§ 11A-4, 11A-5. The arbitrator must follow a complicated formula to determine the amount of any increase in excess of the automatic increase:

> (1) First, grant one-half of the automatic increase to management as a just and reasonable return on investment. The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment.
>
> (2) Next, grant one-half of the automatic increase to management to cover increased operating costs. The arbitrator shall have no discretion to award less than this amount for operating costs.
>
> (3) Next, add an amount to cover operating costs, if any, in excess of one-half of the automatic increase. The arbitrator shall have discretion to add such amounts as are justified by the evidence and otherwise permitted by this chapter.
>
> (4) Next, add an amount to cover new capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increases for new capital expenses.
>
> (5) Next, add an amount to cover old capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the differ-

> ence against any increase for old capital expenses unless such difference has already been used to offset an increase for a new capital expense or another old capital expense . . . .
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> (6) Finally, add an amount to cover increased costs for capital improvements, if any. The arbitrator shall have discretion to add such amount as is justified by the evidence and otherwise permitted by this ordinance.

RCO § 11A-5(I). The RCO also contains a vacancy control provision, which limits the permissible rent increase to 10 percent when a unit is sold. RCO § 11A-14. In sum, the RCO mandates that a "just and reasonable return" for the park owners must always be less than or equal to exactly one half of 75 percent of the annual increase of the CPI. The RCO permits park owners to go to arbitration to pass through additional costs, but such costs must be recaptured without *any* return on investment. In the event a tenant sells his or her unit, the park owners are entitled to a one-time rent increase of 10 percent; subsequent increases are capped by the regular formula.

B

1

Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Park Owners") purchased the Ranch Mobile Estates mobile home park ("the Park") in 1997, at which time the Park was located in an unincorporated part of the County. At the time of the purchase, therefore, the Park was subject to the County's RCO as amended in 1987. When the City incorporated in

2002, the Park fell within the new city's jurisdiction. Because the City adopted the RCO by reference, the Park continued to be subject to the RCO after the City incorporated.

A month after the City incorporated, the Park Owners brought suit in federal court, alleging only facial challenges to the RCO. The Park Owners claimed, *inter alia*, violations of the Takings Clause, the Due Process Clause, and the Equal Protection Clause. The Park Owners also raised complex state law claims, claiming the City failed to follow proper procedures required by the California Government Code when it enacted the RCO. Apparently, the Park Owners initiated the lawsuit in 2002, even though they purchased the Park in 1997, because they claimed the City adopted the RCO without any "hearings or studies or investigations as to whether the County's Ordinance was needed or appropriate for the City." The Park Owners' complaint represented that they "had attempted to meet with the City officials-elect to discuss the City's potential adoption of" the County's RCO, and had "applied to the City for relief from the potential vacancy control restriction in the County Ordinance[,] but it was nevertheless adopted without any change by Defendant City." The Park Owners complained that when it adopted the RCO, "[t]he City failed to review the County Code or make any findings on whether there was a purpose or need" for the RCO in the current real estate market.

The district court stayed the viable federal claims under the *Pullman* doctrine, to permit the resolution of certain complex state law claims that might "moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). The parties set-

tled their state law claims after litigating in Santa Barbara Superior Court, and then returned to federal court for a second time.[2]

2

Back in federal court, the Park Owners moved for partial summary judgment. The district court reviewed the undisputed facts and the affidavits and documents proffered by the parties. The court found that during the time the Park Owners owned the Park, housing costs in the City increased approximately 225 percent. Because of the RCO, the rents charged by the Park Owners did not keep pace with this increase. The below-market rents resulted in the ability of mobile home owners to sell their homes at a significant premium (the transfer premium). The district court found, based on a report provided by the Park Owners, that the transfer premium amounted to, on average, 88 percent of the sale price. "In other words," the district court found, "an average mobile home worth $12,000 would sell for approximately $100,000." The district court found that "the uncontroverted facts . . . establish the existence of a premium," and that even "[t]he City has acknowledged the existence of such a premium."

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[2] Of particular relevance to this appeal, the parties stipulated that there was a gap in time when no rent control ordinance was in effect over the Park. This stipulated fact was necessary to support the timeliness of the Park Owners' facial challenges to the RCO. The statute of limitations for a facial takings claim begins to run with the passage of the challenged law. *See Equity Lifestyle*, 548 F.3d at 1193. The supposed "gap in time" clarified that the City's RCO, for purposes of this litigation, was enacted in 2002. Thus, the Park Owners' suit, initiated in 2002, was timely.

The district court granted summary judgment on the takings claim in favor of the Park Owners on October 29, 2004. At the time the district court made its determination, the law in the Ninth Circuit was that a government regulation effected a taking if such regulation did not "substantially advance" legitimate state interests. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (holding that a condominium rent control ordinance that permits incumbent condominium owners to capitalize the net present value of reduced land rent will not substantially further its goal of creating affordable owner-occupied housing and thus constitutes a taking). The district court found it undisputed that the RCO effected a one-time wealth transfer from the Park Owners to the incumbent tenants, and that the RCO failed to substantially advance its stated purpose of providing affordable housing. The court found, therefore, that the RCO was an unconstitutional regulatory taking and the Park Owners were entitled to just compensation. The City timely appealed.

On May 23, 2005, while the case was on appeal, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). *Lingle* repudiated the "substantially advances" theory upon which the Park Owners had prevailed.[3] In light of this development,

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[3] The Court found that the "substantially advances" theory "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 540. *See generally Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 854-56 (9th Cir. 2007) (discussing *Lingle*'s reasoning and its impact on Takings Clause jurisprudence).

the parties stipulated to vacate the district court's judgment and return for what would now be their fourth round of litigation before a trial court.

3

After some renewed pre-trial litigation, the district court issued a series of summary judgment rulings in which it found in favor of the City on each of the Park Owners' remaining constitutional claims. On April 5, 2006, the district court denied the Park Owners' motion for partial summary judgment, finding that the Park Owners were not entitled to judgment as a matter of law as to whether the RCO constituted a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The court reviewed both parties' expert reports and found that the evidence as to the economic impact of the regulation was "mixed":

> Although [the Park Owners] have enjoyed a rate of return comparable to other real estate investments, [the Park Owners'] evidence tends to suggest that they would have earned more—perhaps much more—in the absence of the RCO.

The district court also denied the Park Owners' motion for summary judgment on their substantive due process and equal protection claims. The parties continued to prepare for trial—designating experts, agreeing to witness and exhibit lists, and filing motions *in limine*.

On July 27, 2006, the district court *sua sponte* issued an Order to Show Cause why the court should not, on its own motion, enter summary judgment in favor of the City. On September 6, 2006, after reviewing the parties' responses, the district court entered summary judgment in favor of the City on all of

the Park Owners' remaining causes of action. The court stated:

> Because this is a facial challenge to the ordinance in question, the evidence [the Park Owners] seek to present at trial vis[-]a[-]vis their Fifth Amendment [T]akings [C]lause claim is irrelevant. To facially attack the ordinance as an uncompensated "taking," [the Park Owners] must demonstrate that the mere enactment of the ordinance constitutes a taking.

The court then complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." The district court did not, however, identify which evidence it found "irrelevant" or "impermissible" in a facial takings claim. The district court also did not make explicit whether it incorporated its April 5 analysis of the Park Owners' *Penn Central* claim into its final judgment or whether it entered final judgment solely on the ground the Park Owners were barred from presenting evidence in a facial challenge. The Park Owners appealed in a timely manner.

II

This case has already been litigated through three full rounds at the trial level, including one in state court and two in federal court, producing one victory for the Park Owners, one for the City, and one tie (the settlement). Accordingly, it may come as a surprise that before we reach the merits of the Park Owners' appeal, we must consider whether the plaintiffs have standing to bring this case and whether this case is ripe for decision.

A

Under Article III, our power to adjudicate is limited to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. Accordingly, we are not authorized to decide a dispute "merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Rather, we must first determine whether a litigant has "standing" to bring suit in the federal forum for his alleged injury.[4] *See id.* at 471-72.

The Supreme Court has defined standing generally as "the question of . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). We have recognized that a plaintiff must at minimum present a suit with "three elements" in order to satisfy us that this question can be answered affirmatively. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121-22 (9th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff must first "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (inter-

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[4] Although neither party addressed standing, "[b]ecause standing is a necessary element of federal jurisdiction, we raise the issue of standing *sua sponte*." *Carson Harbor Village*, 37 F.3d at 475.

nal quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal quotation marks and alterations omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

There is no question that the latter two elements of the standing inquiry are satisfied by the Park Owners. The Park Owners submitted a comprehensive analysis of the effects of the RCO which demonstrated that the RCO reduced the rents the Park Owners could collect by approximately $10,000 per year. *See infra* n.14. The link between the Park Owners' injury and the RCO is thus not "tenuous" but "fairly traceable" to the City's action. *See Tyler v. Cuomo*, 236 F.3d 1124, 1132-33 (9th Cir. 2000). If we were to determine that the RCO effected a taking, the Park Owners are due compensation for their loss—thus, it is not "merely speculative . . . that the injury will be redressed by a favorable decision." *Id.* at 1133.

[1] Nevertheless, we must still determine whether the Park Owners have an "actual injury"—that they have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). This "actual injury" requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but

in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472.

Although in this case there is every indication that the Park Owners (and the City, who never raised the question of standing) believed they had a personal stake in the outcome of the controversy—indeed, both parties litigated the merits of the claim several times over—we have previously denied standing to similar plaintiffs bringing facial takings challenges against rent control ordinances. *See Equity Lifestyle*, 548 F.3d at 1193; *Carson Harbor Village*, 37 F.3d at 475-76. In *Carson Harbor Village*, we held that a mobile home park owner who had purchased the regulated property *after* the allegedly unconstitutional ordinance was passed did not have standing to state a facial takings claim. 37 F.3d at 476. We reasoned that the park owner's claims "necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment." *Id.* Accordingly, because "[i]n a facial taking, the harm is singular and discrete, occurring only at the time the statute is enacted . . . . [b]ecause [the plaintiff] did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim." *Id.* Likewise, in *Equity Lifestyle*, we dismissed a mobile home park owner's facial takings claim because "the injury is treated as having occurred to the previous landowner" who occupied the property at the moment the allegedly offending statute was enacted. 548 F.3d at 1193.

We have also noted, without deciding the issue, that the Supreme Court's opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), calls into ques-

tion the principle that a subsequent property owner does not have standing to assert a facial challenge to a statutory enactment thought to effectuate a taking. *See Equity Lifestyle*, 548 F.3d at 1190 n.11, 1193 n.15. In *Palazzolo*, the Court rejected the notion that only the landowner at the time of the statute's enactment could assert a valid takings claim under *Penn Central*. *See* 533 U.S. at 630 ("[A takings claim] is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."). The Court remarked that "[a] law does not become a background principal for subsequent owners by enactment itself." *Id*; *see Equity Lifestyle*, 548 F.3d at 1190 n.11. These statements, as we have previously noted, cast doubt on *Carson Harbor Village*'s rationale for denying standing to subsequent purchasers—they indicate that a subsequent purchaser may have a stake in a facial suit against the regulation. *See id.*

[2] In this case, however, even if the rule of *Carson Harbor Village* survives *Palazzolo*, the Park Owners satisfy Article III's case or controversy requirements. Although the Park Owners purchased the burdened property in 1997, eighteen years after the County first passed the RCO and ten years after it was amended, the City adopted the RCO in 2002, after the Park Owners were in possession of the Park. Additionally, the parties stipulated that there was some time period between the City's incorporation and the City's adoption of the RCO in which no rent control ordinance was in effect. *See supra* n.2. Thus, assuming that *Carson Harbor Village* is still good law, even though the Park Owners might not have standing to challenge the County's use of the RCO, they are precisely the sort of plaintiffs *Carson Harbor Village* envisioned bringing a facial challenge

to the City's RCO. *See Carson Harbor Village*, 37 F.3d at 476 ("[F]acial [takings] claims necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment."). We therefore find that the Park Owners have standing to bring their takings claim.

B

[3] "[A] takings claim must [also] . . . comply with timeliness requirements. It must be filed neither too early (unripe) nor too late (barred by a statute of limitations)." *Equity Lifestyle*, 548 F.3d at 1190. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985), the Supreme Court held that a takings claim is not ripe until the property owner has attempted to obtain just compensation for the loss of his or her property through the procedures provided by the state for obtaining such compensation and been denied. *Id.* at 195. *Williamson* also set forth an additional hurdle, applicable only to as-applied challenges: the property owner must have received a "final decision" from the appropriate regulatory entity as to how the challenged law will be applied to the property at issue. *Id.* at 192-93. The latter requirement is not applicable here because the Park Owners have raised only a facial challenge. "Facial challenges are exempt from the ["final decision"] prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (citation omitted).

The district court found that this case was ripe, although on a slightly different theory. When the Park Owners filed suit in federal district court, they had approached the City of Goleta to ask for relief from the RCO, but had not brought an inverse condemnation suit in a California court. Thus, the Park Owners had failed to satisfy *Williamson*'s first prong, that the property owners exhaust state remedies. The district court found that the Park Owners' facial challenges were ripe nevertheless because of a narrow exception to the *Williamson* requirement. At the time the Park Owners brought this suit, a claim that a law constituted a taking because it did not "substantially advance" the purpose of that law was exempt from the *Williamson* requirement. *See Yee*, 503 U.S. at 533-34. The Court had created the exception for challenges on the "substantially advances" theory because "this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated." *Id.* at 534 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)). Thus, the Park Owners were permitted to litigate their claims through federal court; they eventually prevailed on the "substantially advances" theory.

When the Supreme Court repudiated the "substantially advances" theory in *Lingle*, presumably it closed this theory's loophole in the *Williamson* requirements. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 345-46 & n.25 (2005) (stating that *Williamson* did not reach "substantially advances" claims, but noting that after *Lingle*, such claims were foreclosed). Therefore, once *Lingle* was decided and the parties stipulated to vacate the first judgment of the district court and re-

turn to that court to litigate the Park Owners' remaining claims, the ripeness of these claims was unclear.

After returning to district court, the City failed to raise the issue of ripeness to the district court's attention, and instead proceeded to defend its RCO on the merits. The district court, too, declined to raise the issue of ripeness and proceeded to grant summary judgment in favor of the City on the merits. In the parties' filings on appeal to this court, neither party raised the issue of ripeness. Unsure of whether this case was ripe, and unsure of whether we had a duty to raise the issue ourselves, we asked the parties to discuss ripeness at oral argument. In addition to presenting the legal arguments we discuss below, the parties both represented that the Park Owners had not brought an inverse condemnation action in a California court. *See generally Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (1997).

1

In order to determine whether the Park Owners's claims are ripe under *Williamson*, and, if so, whether they have satisfied the *Williamson* requirements, we must look closely at *Williamson* and its progeny.

As the Park Owners contended at oral argument, *Williamson* has come under scrutiny since it was decided. Counsel for the Park Owners accused *Williamson* of having effectively "closed the federal courthouse doors" to litigants seeking to vindicate an important right embedded in the Fifth Amendment of the United States Constitution. He was not the first to level this accusation. In fact, the Supreme Court has already acknowledged that the practical effect of *Williamson* is that plaintiffs alleging viola-

tions of the Takings Clause will almost never have the opportunity to litigate their federal claims in federal court. *See San Remo Hotel*, 545 U.S. at 337-41, 344-48. *Williamson* requires plaintiffs to go first to state court, where they are likely to generate a ruling on the merits of their takings claim from the state court that in turn will have preclusive effect should they opt to return to federal court. *Id.*

Chief Justice Rehnquist, joined by three members of the Court, wrote specially in *San Remo Hotel* to explain why he believed *Williamson* may have been wrongly decided. *See id.* at 348, 352 (Rehnquist, C.J., concurring in the judgment) ("I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."). The concurring Justices stated:

> *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound, and would apply to any number of federal claims. But that principle does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.

Id. at 351 (citations omitted). Nevertheless, unless and until the Court decides to reconsider this issue, *Williamson* is the law by which we are bound.[5]

2

Although the Court has so far declined to reconsider *Williamson*, it has with some frequency continued to clarify and modify the doctrine. These modifications provide the framework by which we must determine the application of *Williamson* to the unusual case before us.

Most importantly, the Court has explicitly held that the *Williamson* requirements are merely pru-

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[5] "We are free to muse, however," *Clement v. City of Glendale*, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008), as to an additional reason why *Williamson* may be incorrect. *See San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring in the judgment) (suggesting that it might be appropriate to revisit this issue if the "court below has addressed the correctness of *Williamson*"). *Williamson* reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation," and therefore, until the property owner has actually sought and been denied just compensation in the state court, the Fifth Amendment has not been violated. *Williamson*, 473 U.S. at 194. With this analysis, the Court read an exhaustion requirement into the definition of the constitutional injury. With all due respect, we do not think the Constitution requires this result. "[P]rivate property [is] taken for public use, without just compensation," U.S. CONST. amend. V, at the very moment the government takes the private property and fails to compensate the property owner. The property owner who files an unsuccessful inverse condemnation claim in state court and then somehow manages to have the claim heard in federal court is owed just compensation from the date of the government's action taking the property without compensating the owner, not the date on which the property owner received the final decision in state court denying the taking claim.

dential requirements. In *Lucas v. South Carolina Coastal Council*, the Court stated that the *Williamson* requirements were prudential: "*Lucas* has properly alleged Article III injury in fact in this case," and the fact that he had not satisfied *Williamson* "goes only to the prudential 'ripeness' of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here." 505 U.S. 1003, 1012-13 (1992). Similarly, in *Suitum v. Tahoe Regional Planning Agency*, the Court distinguished constitutional ripeness under Article III and prudential ripeness, and stated that *Williamson* ripeness is grounded exclusively in prudential considerations. 520 U.S. 725, 733-34 & n.7 (1997) (stating that it was undisputed that the case "presents a genuine 'case or controversy' sufficient to satisfy Article III," and considering only whether the plaintiffs case satisfied the prudential requirements). The Court itself called the *Williamson* requirements "prudential ripeness principles." *Id.*; *see also San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring in the judgment) (noting that the Court may have purported to "divin[e]" the *Williamson* requirements from the text of the Fifth Amendment but later had held them to be merely prudential).

The Court's clarification that *Williamson* created mere "prudential requirements" is crucial to our analysis for two reasons. First, if *Williamson* were grounded in Article III ripeness, we would be required to raise the issue *sua sponte* even though neither party raised it. *See Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) ("An appellate court has a duty to consider *sua sponte* whether an issue is ripe for review, in order to ensure that proper subject matter jurisdiction exists to hear the case."). Because *Williamson* has been held to be merely a set of

prudential, exhaustion-type requirements, although we asked the parties for their views, we were not obligated to raise the issue. *Compare Day v. McDonough*, 547 U.S. 198, 202, 205, 209-10 (2006) (holding that AEDPA's statute of limitations was akin to an exhaustion requirement, that it could be waived by the state, and that "district courts are permitted, but not obligated, to consider, *sua sponte*" the issue), *with John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752-54 (2008) (holding that the statute of limitations for cases in the United States Court of Federal Claims, 28 U.S.C. § 2501, is akin to a jurisdictional requirement, and therefore the Court of Appeals for the Federal Circuit was obligated to raise the timeliness issue despite the government's waiver of it). As *Lucas* clearly illustrates, some takings cases will have undisputably satisfied Article III jurisdictional requirements but will have failed to satisfy the *Williamson* prudential requirements. The Court has held that where constitutional ripeness requirements have otherwise been met, a court may consider whether to excuse the failure to satisfy prudential requirements without concern of exceeding its Article III jurisdiction. *Lucas*, 505 U.S. at 1012-14 (citing practical concerns to justify reaching the merits).

[4] Second, because *Williamson* exhaustion is prudential only, the requirement may be waived or forfeited. *See Day*, 547 U.S. at 202, 205 (holding that the state may waive objections to AEDPA's statute of limitations, which, like an exhaustion requirement, is nonjurisdictional); *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1482 (9th Cir. 1995) (holding that "Medicare's administrative exhaustion requirements are jurisdictional in nature" but may be waived by the Secretary

expressly or "involuntarily, through a mistake or omission"); *LaDuke v. Nelson*, 762 F.2d 1318, 1323 & n.4 (9th Cir. 1985) (distinguishing between Article III and prudential standing requirements, noting that one prudential requirement was waived by the plaintiff, and finding the requirement did not bar the suit because the underlying justifications for that prudential limitation were absent); *see also Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 117-25 (2d Cir. 2007) (holding that issue exhaustion in the context of immigration petitions is not "truly 'jurisdictional' in the Article III sense" but rather a prudential administrative exhaustion requirement, and therefore that the defense may be waived and that the court has discretion to review issues not exhausted where it deems the underlying prudential concerns have been satisfied (citation omitted)). Here, in its post-*Lingle* filings before the district court and its filings on appeal to this court, the City of Goleta forfeited the claim that this case was not ripe for review by failing to raise it.

We note that there is tension in our decisions on this point. As we recently observed, "[a]lthough the Supreme Court has described takings claims ripeness as addressing prudential rather than Article III considerations . . . our Circuit has analyzed takings claim ripeness as raising both prudential and Article III considerations." *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (citing cases). In particular, there is tension between language in three of our decisions. In *Hacienda Valley Mobile Estates v. Morgan Hill*, 353 F.3d 651 (9th Cir. 2003), we concluded that "[b]ecause . . . *Hacienda*'s claim is not ripe, we affirm the district court's dismissal for lack of subject matter jurisdiction." *Id.* at 661. In that case, we did not otherwise discuss whether *William-*

son embraced both jurisdictional and prudential requirements, nor did we discuss the impact on *Williamson* of *Palazzolo*, *Suitum*, or *Lucas*. By contrast, in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), we recited that "[i]f a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed," and we then determined that the landowners' takings claim was "not ripe" and "premature." *Id.* at 1160, 1161-62 (quotation marks and citation omitted), 1162. Although the claim was not ripe under *Williamson*, we reached the merits anyway and upheld the constitutionality of the ordinance. *Id.* at 1166. We thus treated the ripeness inquiry as prudential only. In our latest effort in this area, *McClung v. City of Sumner*, we noted the conflict in our cases and then treated the jurisdictional concerns as an aspect of Article III and the prudential concerns as the sole inquiry under *Williamson*. 548 F.3d at 1224 ("[W]e do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.").[6]

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[6] Much of the confusion stems from dicta in our decision in *Southern Pacific Transportation Company v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), where we noted in the context of a takings claim that "ripeness is more than a mere procedural question; it is determinative of jurisdiction" and remarked that the lack of ripeness "may be raised sua sponte if not raised by the parties." *Id.* at 502. *Southern Pacific* was decided previous to the Supreme Court's decisions in *Palazzolo*, *Suitum*, and *Lucas*, and this language is inconsistent with those decisions.

[5] In light of the Supreme Court's unmistakable pronouncements, we think that *McClung* and *Richardson* represent the more considered view. In this case, as in *McClung*, there is no question that the Park Owners have satisfied Article III requirements, including ripeness. We have held, in another context, that "the [Article III] ripeness inquiry contains *both* a constitutional and a prudential component." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (emphasis added); *see also Colwell*, 558 F.3d at 1123 ("[R]ipeness doctrine reflects both constitutional and prudential considerations."). We stated in *Thomas* that the Article III component of the ripeness inquiry "can be characterized as standing on a timeline," and that the real question in cases presenting questions of Article III ripeness is whether "there exists a constitutional 'case or controversy,' [and] that the issues presented are 'definite and concrete, not hypothetical and abstract.'" 220 F.3d at 1138, 1139 (quotations omitted). *See also Colwell*, 558 F.3d at 1123. Where it is clear that a takings plaintiff has standing—including "standing on a timeline"—and has "presented a genuine case or controversy sufficient to satisfy Article III," the further questions under *Williamson* of whether a plaintiff has "received a final decision regarding the application of the challenged regulations to the property at issue" and whether the he has "sought compensation through the procedures the State has provided for doing so" are merely "prudential ripeness requirements." *Suitum*, 520 U.S. at 733 n.7, 734 (internal alterations and quotation marks omitted). In this case, then, where the Park Owners have obviously presented a live case or controversy, *see supra* Part IIA, it is clear that any further questions under *Williamson* do not raise the

spectre of an Article III jurisdictional bar. *See Colwell*, 558 F.3d at 1123 (noting that because "[p]laintiffs' stake in the legal issues is concrete rather than abstract . . . the ripeness requirement of Article III is satisfied.").

3

Having reviewed the *Williamson* jurisprudence, we find that we may reach the merits of the Park Owners' takings claim. For the following reasons, "we do not think it prudent to apply that prudential requirement here." *Lucas*, 505 U.S. at 1013.

First, the City forfeited its claim that the case was not ripe for decision. Because the *Williamson* requirements are "prudential ripeness principles," *Suitum*, 520 U.S. at 733-34, and not Article III jurisdictional limitations, they may be waived or forfeited. After *Lingle* prompted the parties to stipulate to vacate the initial judgment of the district court and return for litigation at the trial level, the City had the burden to raise any remaining prudential concerns under *Williamson*. Instead, the City was content to continue litigating the claims on the merits. The City expressed no doubts that the record in the case was fit for a decision by a federal court. Moreover, the City was not concerned that the Park Owners' failure to initiate an inverse condemnation action in state court left any doubt as to whether the state had yet compelled the City to provide just compensation to the Park Owners. The City did not, in fact, mention ripeness at all until prompted by an order from this court to discuss the issue at oral argument.

At oral argument, the City acknowledged that as part of its appeal it had not even considered whether *Williamson* prevented us from reaching the Park

Owners' takings claims, and first came to the position that *Williamson* did so after receiving our order to be prepared to discuss *Williamson* at oral argument. The City argued to us that the case was not ripe under *Williamson*, and offered as supporting authority our opinions in *Equity Lifestyle Properties*[7] and *Carson Harbor Village*. Neither of these cases, nor in fact *Williamson* itself, appeared in the City's appellate brief.[8] In answer to our questions, the City expressly conceded that the *Williamson* requirements were merely prudential and not Article III jurisdictional requirements. The City argued that its claim was not waived because we could still exercise our discretion to find that the case was not ripe because of prudential considerations. The City's argument lacks merit, however. Because the *Williamson* requirements are merely prudential, the claims can be waived. The fact that we may exercise our discretion to find the claims unripe does not change the fact that the claims are waivable, and that in this case the City forfeited them.[9]

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[7] *Equity Lifestyle Props., Inc. v. County of San Luis Obispo* ("*Equity Lifestyle Properties*"), 505 F.3d 860 (9th Cir. 2007), *withdrawn and superseded on denial of rehearing by Equity Lifestyle*, 548 F.3d at 1184.

[8] The opinion in *Equity Lifestyle Properties* was not filed until September 17, 2007, and so could not have been included in the City's brief, initially filed March 12, 2007. However, *Williamson* and *Carson Harbor Village* had been decided several years earlier, as had numerous other *Williamson* cases, and *Equity Lifestyle Properties* could have been offered in a letter under FED. R. APP. P. 28(j).

[9] Moreover, *Equity Lifestyle* and *Carson Harbor Village* do not control our decision here. Those cases used the general principles of *Williamson* and found the property owners' as-

The fact that the City forfeited its ripeness claim has an additional, evidentiary implication. It confirms our belief that the record in this case is eminently ripe for review. *Williamson* could have resurfaced at the time that *Lingle* implicitly foreclosed the Park Owners' exception from *Williamson* based on the "substantially advances" theory. It did not. It would certainly seem counter-intuitive to us now to think that a case that had at that point already been litigated through three rounds—two in federal court and one in state court—could suddenly become "unripe." The fact that the City failed to notice this as well suggests to us that any concerns meant to be protected by *Williamson* had been sufficiently protected by the unusual and lengthy development of the case. *See Palazzolo*, 533 U.S. at 622 (holding that the purpose of *Williamson* is to develop the record in order to understand the effect of the challenged regulation).

Second, we find that the Park Owners have substantially satisfied the *Williamson* requirements. "[I]t is important to bear in mind the purpose" that the *Williamson* requirement serves. *Id.* at 622. *Williamson* held that a facial takings claim could not be

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applied takings claims had not been properly exhausted. *See Equity Lifestyle*, 548 F.3d at 1190-92; *Carson Harbor Village*, 37 F.3d at 474-75. Neither case dealt with the application of *Williamson* in a case where the government failed to raise the ripeness issue on appeal after the district court implicitly found the takings claims ripe. Similarly, neither case presented the question of whether we could find that the property owners had substantially satisfied the prudential concerns embodied in *Williamson* after three rounds of trial-level litigation in state and federal court.

ripe until the property owner has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. Here, the Park Owners did, in fact, take this case to state court. Although they did not file a formal inverse condemnation proceeding, they litigated and settled several state law issues relevant to the alleged taking with the City, including issues necessary to establish the timeliness of the takings claim. They then returned to federal court, without having been compensated for the taking of their property. There is no doubt that they have now unsuccessfully attempted to obtain just compensation through procedures provided by the State. *See id.*

Moreover, there is just no question that the case is fit for review. The parties have now litigated this case through three full rounds at the trial court level. There is no doubt that there is sufficient evidence in the record to "determine whether [the] regulation goes too far.' " *Palazzolo*, 533 U.S. at 622 (quoting *MacDonald* 477 U.S. at 348). In addition, as we discuss below, it is *undisputed* that: (1) the RCO has caused a significant loss of value to the Park Owners' property; and (2) neither the City of Goleta nor the State of California has ever offered compensation for this loss in value. To the contrary, the City has litigated against providing compensation continuously since 2002.

[6] Given the Park Owners' substantial compliance with the *Williamson* requirements, and the City's forfeiture of the ripeness claim, we believe that *Lucas* compels us to reach the merits of this case. "In these circumstances, we think it would not accord with sound process to insist that [the Park Owners] pursue the late-created" need to file a formal inverse

condemnation action in state court "before [their] takings claim can be considered ripe." *Lucas*, 505 U.S. at 1012. Just like *Lucas*, the Park Owners "[have] properly alleged Article III injury in fact in this case." *Id.* Any failure to have filed a formal inverse condemnation claim while already in state court "goes only to the prudential 'ripeness' of [the Park Owners'] challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here." *Id.* at 1013.

III

[7] Having held that we may reach the merits of the Park Owners' takings claims, we now turn to those claims.[10] As we have recently summarized, the Supreme Court has identified three basic categories of regulatory takings claims:

> [1] where government requires an owner to suffer a permanent physical invasion of property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); [2] where a regulation deprives an owner of all economically beneficial use of property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and [3] where the *Penn Central* factors are met, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

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[10] We review a district court's ruling on summary judgment that no regulatory taking has occurred *de novo*. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). "We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.* (internal quotation and citation omitted).

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007); *see Lingle*, 544 U.S. at 538. On appeal, the Park Owners raise only a facial challenge under *Penn Central*.

As described in *Lingle*,

> The Court in *Penn Central* acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that have particular significance. Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

544 U.S. at 538-39 (internal quotation marks and citations omitted). We must first address each factor in turn, and then weigh the factors together, in what has famously been described as an "essentially ad-hoc, factual inquir[y]." *Penn Central*, 438 U.S. at 124. Before we can apply the *Penn Central* factors, however, we must consider the viability of a facial

challenge under *Penn Central*, and determine what facts we may consider when engaging in *Penn Central*'s ad-hoc factual inquiry.

A

The Park Owners have brought only a facial challenge to the RCO under *Penn Central*—they have not brought a corollary as-applied claim. Unlike an as-applied challenge, which asserts that a statute or regulation "by its own terms, infringe[s] constitutional freedoms in the circumstances of the particular case," *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972), a facial challenge alleges that the statute or regulation is unconstitutional in the abstract: that "no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The Park Owners' decision to refrain from an as-applied challenge has two important consequences. First, as noted above, the decision exempts the Park Owners from the "final decision" prong of *Williamson*. *See Hacienda Valley Mobile Estates*, 353 F.3d at 655 ("Facial challenges are exempt from the ["final decision"] prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation."). Second, the Park Owners' decision to cast their *Penn Central* claim as a facial challenge places limits on the types of evidence that can be considered in adjudicating the claim. "In facial takings claims, our inquiry is limited to 'whether the mere enactment of the [regulation] constitutes a taking.' " *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) (quoting *Agins*, 447 U.S. at 260); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). More

specifically, in a facial challenge "we look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe–Sierra*, 216 F.3d at 773 (internal quotation marks and citation omitted).

For this reason, the Supreme Court has noted that property owners bringing a facial takings challenge "face an uphill battle." *Suitum*, 520 U.S. at 736 n.10; *see Keystone*, 480 U.S. at 495. The fact that the Park Owners have characterized their facial challenge under *Penn Central* creates further complications. In a typical *Penn Central* claim, the court must consider factors that will usually not be found in the text of the statute, such as the economic impact on the claimant and the claimant's investment-backed expectations. Nevertheless, when adjudicating a facial challenge, the court must be careful not to simply look at "the effect of the application of the regulation in specific circumstances." *Tahoe–Sierra*, 216 F.3d at 773. The Park Owner's facial *Penn Central* claim requires us to address this apparent paradox: we must confront the question of whether a facial challenge under *Penn Central* is actually a viable legal claim; and if we determine that it is, we must then consider what evidence the Park Owners may present to prove their claim.

1

In the district court's summary judgment ruling of April 5, 2006, the court reviewed the record and engaged in a detailed *Penn Central* analysis. Each party had proffered an expert report in support of its position: the Park Owners proffered a report by Dr.

John M. Quigley,[11] and the City responded with a report by Mr. William Thomsen.[12] In its April ruling, although the district court did not rely on the detailed figures presented in either report, the district court did credit the core findings of each report (which we discuss *infra*). The district court found in favor of the City under *Penn Central*. Subsequently, the district court issued another summary judgment ruling on September 6, 2006, in which it purported to address the Park Owners' remaining claims. The district court then reaffirmed its ruling that the Park Owners had not prevailed under *Penn Central*. The district court's ruling was ambiguous, however, as to the basis for its decision. The court was unclear as to whether it was simply re-incorporating and reaffirming the *Penn Central* analysis applied in its April ruling, or whether it now based its ruling on the new ground that the Park Owners were precluded from presenting any of the evidence the court had relied on in April because the Park Owners brought only a facial challenge. The district court stated that the evidence the Park Owners sought to present "at trial" was "irrelevant" to a facial challenge, and complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." Because of the necessarily "ad

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[11] Dr. Quigley is a professor of economics, business, and policy at the University of California, Berkeley and serves as the Director of the Berkeley Program on Housing and Urban Policy. He served as President and Director of the American Real Estate and Urban Economics Association and has been a member of the National Academy of Sciences/National Research Council Committee on National Urban Policy.

[12] Mr. Thomsen is an MBA/CFA with the accounting firm of Grobstein, Horwath & Company, LLP.

hoc" nature of a *Penn Central* challenge, if the district court was adopting a rule that a property owner may present no evidence of the effect of a regulation on his property in a facial challenge, the court would essentially be adopting the rule that there is no such thing as a facial challenge under *Penn Central*.

Similarly, the City's position to our court on the meaning of a facial *Penn Central* challenge is ambiguous. The City has never argued that a facial challenge under *Penn Central* is not a viable legal claim. On the contrary, the City devoted much of its briefing and oral argument to defending the district court's April ruling on the Park Owners' *Penn Central* facial challenge, including the court's reliance on the core conclusions of the two parties' expert reports. In defending the conclusion of the district court on appeal, the City argues:

> [T]he district court concluded that absent the Ordinance, Park Owners would have achieved higher rates of return. This conclusion credits Park Owners' economic evidence and essentially agreed with Park Owners that the Ordinance had an economic impact on their business operation. It is difficult to imagine how the court's analysis and conclusion regarding the Ordinance's economic impact can be found lacking.

Elsewhere in its brief, however, the City complains that the Park Owners have introduced so much evidence as to try to turn a facial challenge into an as-applied challenge. The City does not point out which evidence is proper and which is impermissible in a facial challenge.

[8] Both logic and Supreme Court precedent support our conclusion that a facial challenge under

Penn Central must exist as a viable legal claim. Certainly it is apparent that a facial challenge is easier to mount under either *Loretto* or *Lucas*. It is far easier to prove that a regulation effects a physical invasion or that it denies an owner of all economically viable use of his property without considering evidence beyond the face of the regulation than it is to demonstrate that the regulation's effect satisfies the multifactor test of *Penn Central*. However, we have recently described the *Loretto* and *Lucas* tests as categorical "exceptions to the application of the regulatory takings test" as set forth in *Penn Central*. *Scheehle v. Justices of the Sup.Ct. of Ariz.*, 508 F.3d 887, 894 (9th Cir. 2007); *see Lingle*, 544 U.S. at 538 ("Outside these two relatively narrow categories . . . , regulatory takings challenges are governed by the standards set forth in *Penn Central*."). In fact, the Supreme Court has emphasized that *per se* takings claims are disfavored, whereas *Penn Central* claims are preferred. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 339, 342 (2002). It would seem incongruous indeed if only the disfavored exceptions to *Penn Central* could be brought as facial challenges, where a claim under the general rule of *Penn Central* could not.

[9] Supreme Court precedent also demonstrates the viability of a facial challenge under *Penn Central*. In *Keystone*, the Court emphasized the difficulty of prevailing on a facial challenge under *Penn Central*, and ultimately concluded that the mere enactment of the challenged statute did not effect a taking. *See Keystone*, 480 U.S. at 493-99. The Court's ruling implicitly recognizes that a facial *Penn Central* challenge is feasible. Moreover, in *Keystone*, the Court considered the limited evidence that the property owners had proffered, including the actual tonnage of

coal that the challenged statutes prevented the owners from removing, and the percentage of total coal in the mine that the restricted tonnage represented. *See id.* at 496-99 & n.24. The Court found that the property owners's facial challenge under *Penn Central* failed because the evidence the property owners provided was insufficient to demonstrate economic harm in any significant amount. *Id.* Thus, the Court found against the property owners not because the Court was not permitted to consider the evidence provided, but rather because the property owners' evidence did not show that the mere enactment of the statute amounted to a taking.[13] *Keystone* suggests that a facial *Penn Central* challenge is difficult, but viable. Similarly, in *Connolly v. Pension Benefit Guaranty Corp.*, the Court considered and rejected a facial *Penn Central* challenge to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980. 475 U.S. 211, 213, 224-28 (1986); *see also Tahoe-Sierra*, 535 U.S. at 321 (holding that the property owners' facial takings claim should have been brought under *Penn Central*); *Hodel*, 452 U.S. at 294-97 (ruling on a facial challenge under *Penn Central*). *Keystone* and *Connolly* demonstrate that a facial challenge under *Penn Central*

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[13] To be precise, in *Keystone*, the property owners expressly appealed only a facial challenge because they wanted to avoid the expense of producing the detailed evidence they believed would be necessary to mount an as-applied challenge. *See Keystone*, 480 U.S. at 493-94. Thus, the issue be fore the Supreme Court was not how much evidence a property owner may produce in a facial challenge, it was how little evidence the property owner could produce and still prevail in a facial challenge. The Court found the property owners had not produced enough. *See id.* at 494-502.

may be difficult, but the mere fact that *Penn Central* requires an ad-hoc multi-factor balancing test does not bar a facial challenge.

2

The fact that the Court's precedents approve of a facial challenge under *Penn Central* requires us to consider what kinds of evidence beyond the text of the challenged regulation the reviewing court may consider. A facial challenge seeks to prove that "the 'mere enactment' of the [regulation] constitutes a taking." *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295). Property owners "thus face an uphill battle in making a facial attack on [a regulation] as a taking." *Id.* at 495. In reviewing a facial challenge under the Takings Clause, we "look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe-Sierra*, 216 F.3d at 773 (quotation marks omitted). In a takings case, however, we are cognizant that the text of the regulation itself will rarely describe the actual economic effect on property owners in concrete terms. Thus, the very nature of a takings inquiry would seem to require that we consider some evidence outside of the text of the statute. *See id.* at 781 n.24 (discussing the tension between the demands of a facial challenge and the necessity of demonstrating the economic impact of the regulation in a takings claim, and suggesting that there are still open questions as to what kinds of information may be considered in a facial takings claim); *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998) (evaluating a facial regulatory takings claim, and stating that plaintiffs have the burden of "introducing evidence of the economic impact of the enactment . . . on their property").

The proper inquiry in a facial challenge is not whether the property owners can demonstrate that property has been taken without providing evidence beyond the text of the regulation; the inquiry is whether the "mere enactment" of the regulation constitutes a taking. *See Keystone*, 480 U.S. at 495 (quotation marks omitted). Thus, in a takings claim, we must look not only at what the statute says, but also at what its mere enactment does. *See Garneau*, 147 F.3d at 807-08. At a minimum, we must look to the general economic principles that allow us to interpret the statute's effect, so that we may understand the regulation's general scope and dominant features. *Cf. Yee*, 503 U.S. at 526-31 (reviewing academic literature to understand the economic effects of a mobile home rent control ordinance); *Keystone*, 480 U.S. at 500-02 (using economic principles to understand the impact of a coal mining regulation where Pennsylvania law creates unique, severable interests inland related to coal mining); *Tahoe-Sierra*, 216 F.3d at 776-77 (using academic literature to develop an analysis to determine whether a temporary moratorium on development effects a taking). In addition, there must be a way to understand the economic impact on the complaining property owner. A property owner who is not permitted at least to present evidence that proves that he has actually suffered the kind of economic harm of which he complains would be precluded from even proving his own standing to bring the claim—the property owner must be permitted to adduce evidence that he has suffered the injury for which he seeks redress. *See Lujan*, 504 U.S. at 563; *Pennell v. City of San Jose*, 485 U.S. 1, 6-7 (1988) (requiring the property owners to allege standing to bring a takings claim by alleging that they are likely to suffer economic injury by enforce-

ment of the challenged ordinance). Thus, even in a facial challenge, the court may consider evidence related to the individual property owner that illustrates the economic impact that the mere enactment of the statute had on that owner and proves that the owner has suffered the injury of which he complains. *See Keystone*, 480 U.S. at 496-99 (considering evidence of the actual tonnage of coal the regulations rendered unremovable); *Garneau*, 147 F.3d at 807-08 (stating that plaintiffs bringing a facial challenge "must show that the value of their property diminished as a consequence" of the regulation); *Richardson*, 124 F.3d at 1154 n.2 (providing an example using exact dollar amounts as "illustrative" of the economic impact of the regulation in a facial challenge).

In this case, the Park Owners submitted evidence of the effect that the mere enactment of the RCO had on their property. The Park Owners principally relied on the report by Dr. Quigley. The City did not object to the use of this report; on the contrary, the City responded by producing its own expert report by Mr. Thomsen. The district court reviewed both parties' expert reports in preparation for its summary judgment ruling in April. In conducting its analysis, the district court did not rely on the detailed information provided in each report about the actual economic impact of the RCO on each particular mobile home within the Park, nor did it rely on the information about the actual impact on the Park as a whole. Instead, the district court relied on the core findings of the expert reports and the general findings taken from economic studies and academic literature about the effects of mobile rent control ordinances generally. On appeal to this court, the City has defended the district court's analysis and its use of core findings from each party's expert report. It

has argued, however, that attempts by the Park Owners to provide evidence beyond the core findings of the Quigley Report is an impermissible attempt to convert a facial challenge into an as-applied challenge. The City has not identified which evidence would be so property-specific as to be impermissible in a facial challenge.

We need not, however, determine the exact boundaries between permissible and impermissible kinds of evidence to support a facial challenge. The City has defended the district court's use of core findings from each party's report. Therefore, we will confine ourselves to review of these same core findings in our review of the Park Owners' facial *Penn Central* challenge. We will provide additional figures from the Quigley Report only for purposes of demonstrating that the Park Owners have suffered the actual economic injury of which they complain and illustrating in concrete terms the economic impact that the "mere enactment" of the RCO had in Goleta. In addition, we may consider the district court's undisputed factual findings about property values in the City of Goleta, as these values affect the entire City, and thus everyone subject to the City's RCO, and are not specific to the RCO's application to the Park Owners. With these limitations in mind, we consider the three factors of the *Penn Central* analysis.

B

The three factors described in *Penn Central* are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. We consider each in turn.

[10] The first consideration under *Penn Central* is the "economic impact of the regulation on the claimant." *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). There is no mathematical formula provided by the Constitution, but "if [the] regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). By definition, under *Penn Central*, the property owners need not show a complete deprivation of all economically viable use of the property. Deprivation of all economically viable use would entitle the property owners to just compensation under *Lucas*, and there would be no need to apply a *Penn Central* analysis. *See Palazzolo*, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred . . . ."). In sum, to prevail under *Penn Central*, the property owner must demonstrate a loss of value that may be less than 100 percent, but high enough to have "go[ne] too far." *Id.*

[11] There is a broad consensus that a mobile home rent control ordinance like the RCO causes a wealth transfer from the mobile home park owners to the incumbent mobile home tenants. The Quigley Report explained how the RCO affects the mobile home market. Mobile homes have a divided ownership. A park owner owns the real estate, consisting of the home sites, while the home itself is owned by the tenant who rents the site. When a jurisdiction enacts a rent control ordinance, the right to occupy a mobile home site at a below-market rent acquires its own intrinsic value distinct from the value of the land. The owner of a given mobile home at the time the RCO is passed will capitalize this value (equal to

the present value of the future stream of rent discounts) into the selling price of the home. This is referred to as the "transfer premium." A new mobile home tenant, anxious to acquire the right to regulated, below-market rent, pays the transfer premium in the paid to the mobile home owner instead of to the park owner.[14] Accordingly, in the end, the RCO

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[14] The Quigley Report illustrated these points with figures for the average property in its sample of dwellings sold in the Park during the relevant period. The Report estimated that, based on comparable land rental rates, the annual unregulated market rental rate of the average site in the Park would be $13,344. The RCO-regulated rental rate on the average site is only $3,256. Thus, a home owner pays roughly $10,000 less in annual rent to the Park Owners. This annual savings, however, is reflected in the selling price of the mobile home. The Report estimated that the average mobile home, but for the RCO, would be worth $14,037. Because of the RCO, however, the average mobile home sold for $119,091. This difference equals $105,054, or a full 88 percent of the entire sale price, and represents the net present value to the mobile home owner of being able to save roughly $10,000 a year in rent.

As a hypothetical, the Quigley Report then calculated what would happen if a mobile home owner financed the average home with a typical mortgage product used for these kinds of purchases. The Quigley Report found that, under the RCO, the average annual housing-related payments of the purchaser would be: $13,968 in loan repayment plus $3,256 in regulated rent. Without the RCO, because the same home would have sold for $105,054 less, but rent would have been more, the average annual housing-related payments would be: $1,646 in loan repayment plus $13,344 in rent. As the Quigley Report noted, in this particular example, the mobile home owner would actually be paying *more* annually under the City's RCO than he would in an unregulated market. This is due in part to the fact that mobile home mortgage products tend to have higher interest rates and their purchasers often have low asset levels or weaker credit histories. In general, however, the Quigley Re-

does not actually decrease housing costs at all for the new tenant. If a new tenant purchases the home, the new tenant will have to pay an amount equal to the rental discount in the form of the transfer premium.

The Quigley Report summarizes the effect of the RCO:

> For every dollar by which housing costs are reduced through lower mobile home rents, consumers are forced to pay higher purchase prices for these mobile homes. These two effects roughly cancel. Thus, the principal effect of the rent control regulation is to inhibit increases in the supply of affordable housing in the market and consequently to increase rents in the local economy. The principal costs are borne by those consumers who otherwise would have been able to reside in lower cost housing in the region.

The Quigley Report estimated that the RCO forced the Park Owners to rent the entire Park at close to an 80 percent discount below the market rate. The RCO has resulted in transfer premiums of approximately 90 percent of the sale price of mobile homes, enjoyed by the incumbent tenants.

[Footnote continued from previous page]

port suggests that mobile home owners will end up paying roughly the same amount in annual expenses whether or not the RCO is in effect. The difference is in who captures the value of the rent-controlled site in the Park. Without the RCO, the Park owners receive roughly $10,000 more a year in rent. With the RCO, the incumbent mobile home owners receive a one-time premium of $105,054, captured in the sale value of their home.

The district court credited the Quigley Report's findings and found that the RCO causes a wealth transfer from the Park Owners to their tenants. The district court found that housing costs in the City of Goleta increased "approximately 205% from 1997 to 2003, and increased another 21.1% in 2004. The rent on the rent-controlled spaces in the Park [has] not kept up with the increase in housing costs." The court found:

> The RCO has resulted in what is known as "transfer premiums" in the sale of mobile homes. These transfer premiums constitute approximately 90% of the sale price of mobile homes in the Park. No provisions in the RCO prevents the seller of a mobile home from capturing transfer premiums.

More simply, "an average mobile home worth $12,000 would sell for approximately $100,000." The district court concluded that "the uncontroverted facts . . . establish the existence of a premium." Indeed, it found that even "[t]he City has acknowledged the existence of such a premium."[15] The Supreme Court observed the same wealth transfer phenomenon in *Yee*:

> [T]he effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase

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[15] The City's own expert, William Thomsen, recognized the existence of the transfer premium in his report: "residents who departed the Park and were able to sell their homes at a premium have received an additional benefit in that the capitalized economic benefit of this rent control could then be used to finance the purchase of another home or otherwise help defray occupancy costs elsewhere."

> significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the [challenged] ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so 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[challenged] ordinance transfers wealth only to the incumbent mobile home owner.

503 U.S. at 530 (internal citation omitted). The Court in *Yee*, however, left open the question of whether the wealth transfer constitutes a regulatory taking under *Penn Central* because the only issue before the Court was whether the wealth transfer constituted a per se taking under *Loretto*. *See id.*

Our past cases have observed the wealth transfer effect as well, but the posture of those cases or differences in takings law when those cases were decided made it unnecessary to reach the question of whether the wealth transfer effected a regulatory taking under *Penn Central*. *See, e.g.*, *Richardson*, 124 F.3d at 1165-66; *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685-89 (9th Cir. 1993); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276-77, 1279 (9th Cir. 1986) ("[T]he tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara."), *overruled on other grounds by Yee*, 503 U.S. at 529-30; *see*

also Chi. Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741-42 (7th Cir. 1987) (separate opinion of Posner, J., with whom Easterbrook J., joined) (detailing empirical studies and economic analyses showing that rent control regulations reduce the quantity and quality of affordable housing).[16]

[12] The wealth transfer from the Park Owners to their tenants is a naked transfer accomplished by the mere enactment of the RCO. By taking the value of the Park Owners' mobile home sites and transferring it to the Park's incumbent tenants, the RCO has effected "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984). In the classic naked transfer, the government takes property from A to give to B for the sole benefit of B. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."). In this case, the RCO works slightly differently, as the government does not act

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[16] Academic literature has also discussed the wealth transfer created by mobile home rent control ordinances. *See, e.g.*, William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 872-75 (1991);Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 405, 423-31 (1988); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 758-59 (1988).

as a fiscal intermediary. Because of the divided ownership of mobile homes—the Park Owners own the real estate and the tenants own the home itself—the transfer can be effected directly by the mere enactment of the RCO. The RCO takes wealth from A, the Park Owners, and transfers it to B, the incumbent tenants, who reap the benefits in the form of mobile homes worth several times their original value.[17]

Incumbent tenants are not the only group that benefit from the City's passage of the RCO. The RCO also benefits another group: those who would like to support affordable housing initiatives without paying for it themselves, for example, owners and developers of other forms of housing such as apartments that might otherwise be forced to provide subsidized housing, and taxpayers who want to subsidize affordable housing without actually increasing their own tax liability to pay for it. *See Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part) ("The politically attractive feature of [rent control] regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be

[17] As a result, the RCO is unlikely to increase the availability of affordable housing in the City of Goleta, for the widely-recognized reasons summarized in the Quigley Report. The RCO only affects a small portion of the total housing market in the City, and because of the potential to capitalize the value of the regulated rent into the sale price of the mobile home, even within the mobile home market, the RCO does not actually generate mobile home sites that are cheaper to live on than they would be if rents were unregulated. It is easy to see why mobile home tenants would encourage the City to adopt the County's RCO without further investigation as to whether such regulation was necessary in the real estate market of 2002.

achieved 'off budget,' . . . .") Thus, the City, "solely on the ground that those favored have exercised the raw political power to obtain what they want," has taken from A to give to B, both for the benefit of B (the incumbent tenants) and for a larger group, who does not wish to support affordable housing through more politic means. The Takings Clause does not prohibit this use of the police power, *see Kelo*, 545 U.S. at 489-90, but the Takings Clause does not ask us to pretend that such a naked transfer does not cause a severe, observable economic impact on the property owner whose property has been conscripted for the public's use.

The City's principal argument in response is that, even conceding the wealth transfer, the RCO's economic impact on the Park Owners does not amount to a *Penn Central* taking because the Park Owners can still earn a return on their investment.[18] The City supplied some evidence in the Thomsen Report to show that the Park Owners have earned, depending on the analysis, roughly 10 percent on their investment annually. According to the report, this

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[18] The City also claimed that incumbent tenants do not necessarily benefit from the onetime wealth transfer in the form of the "transfer premium" because the transfer is not realized until the tenants sell their homes, and they do not all sell their homes. This claim is irrelevant to the point that real wealth has been transferred. Even if an incumbent tenant does not sell his mobile home, he may have realized value in it. He might, for example, be permitted to borrow against the increased value of the home created by the RCO while he remained in the home. To use the district court's figures, an incumbent tenant who purchased his home before the passage of the RCO for $12,000 could, after the passage of the RCO, take out a home equity loan against a $100,000 house.

return is, again depending on the analysis, comparable to or occasionally better than the return on investment earned by real estate investment trusts and other kinds of investments according to national indices.

The district court credited both the Park Owners' evidence of the wealth transfer and the City's evidence of return on investment. Reviewing the reports together it found:

> Considering all this evidence, a reasonable inference that may be drawn is that although Plaintiffs have received a rate of return on investment comparable to other real estate investments, and although they have enjoyed a significant appreciation in value of their property, Plaintiffs could have received higher rates of return in the absence of the [regulations].

The district court concluded that the wealth transfer was greater than any return on investment:

> The evidence of the rate of return is mixed. Although Plaintiffs have enjoyed a rate of return comparable to other real estate investments, Plaintiffs' evidence tends to suggest that they would have earned more—perhaps much more—in the absence of the RCO.

Nevertheless, the district court reasoned that because the Park Owners could receive *some* return on investment—even though it was less, perhaps even substantially less, than their wealth transfer loss—the Park Owners had not suffered a regulatory taking.

[13] We disagree with the district court's reasoning. The fact that the Park Owners earned some return on investment is not, as the district court rea-

soned, the end of their *Penn Central* claim. Even if the Park Owners earned some return on investment, a taking may have occurred. If the Park Owners could show that the RCO denies them *all* return on investment, they could, of course, prevail on a *per se* takings claim under *Lucas*, and we would not have to labor through the *Penn Central* analysis. *Penn Central* thus practically assumes that the Park Owners may be able to earn some return on investment. Our challenge under *Penn Central* is to figure out what loss of potential return on investment, greater than zero but less than 100 percent, is significant enough to constitute a regulatory taking. *See Tahoe-Sierra*, 535 U.S. at 330. The district court thus erred in the conclusion that because plaintiffs can realize a "rate of return comparable to other real estate investments," the Park Owners have not suffered significant economic harm. *Cf. Hall*, 833 F.2d at 1278 ("The city's argument that [the mobile home park owners] are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred . . . . Whether compensation is adequate is an inquiry separate from whether there has been a taking.").[19]

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[19] The dissent offers a different rationale from the city and the district court. Judge Kleinfeld argues that "[t]here is nothing in the record to support the notion that the Guggenheims' interest in the trailer park was worth more before than after the City reenacted the County ordinance." Dissenting Op. at 13880. As with the question of return on investment, this point is better addressed as a question of the taking compensation due rather than whether there was a taking. As Judge Kleinfeld admits, "[i]f this were a new rent control ordinance . . . this might be an actionable case." Dissenting Op. at 13879-80. It is a new ordinance, which is what makes this case ripe for review.

[14] The Park Owners may have enjoyed a positive rate of return, perhaps even a rate of return comparable to some other real estate investments, but the district court found, and neither the City nor the Thomsen Report denies, that the Park Owners "would have earned more—perhaps much more" if not for the RCO. Although the "much more" does not appear to have been reduced to a total dollars-and-cents loss, the district court also found—again without contradiction—that the loss could be as high as almost 90 percent of the sale price on a site-by-site, home-by-home basis. To illustrate this impact, the Quigley Report did estimate possible losses for individual units in the Park, and some of the figures run upwards of $100,000 per site. By any measure, that is a significant economic transfer from the Park Owners to the tenants, one that must be characterized as a loss for the Park Owners. *Cf. Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that an extraction of 96 percent of the property's value was severe enough to constitute a taking under *Penn Central*). The undisputed evidence shows that the mere enactment of the RCO has caused a significant economic loss for the Park Owners. This factor weighs heavily in the Park Owners' favor.

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[15] The next consideration is "the extent to which the regulation has interfered with distinct in-

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[Footnote continued from previous page]

See supra at 13822-34. We simply disagree that "readoption was merely a ministerial re-enactment . . . [and] had no economic impact on the Guggenheims." Dissenting Op. at 13879-80.

vestment-backed expectations." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). Here, it is undisputed that the RCO was passed in Santa Barbara County in 1979 and amended in 1987, and that the Park Owners purchased the Park in 1997. The purchase was eighteen years after the RCO was first passed by the County, but five years before the City of Goleta adopted the RCO in 2002. We agree with the finding of the district court, therefore, that the Park Owners "got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent control ordinance."[20] Thus, we take pause at the notion that the Park Owners can claim that the challenged regulation took between 80 and 90 percent of the value out of their rental park when, apparently, this value had been extracted before they purchased the park.

Our analysis of this issue is controlled by *Palazzolo*. In that case, a corporation owned property at the time the government enacted the challenged regulation. 533 U.S. at 613. Palazzolo came into possession of the property in 1978 when the corporation's charter was revoked and title to the property passed, by operation of law, to Palazzolo as the sole shareholder. *Id.* at 614. At that time, the property was already subject to the regulation that designated

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[20] The parties stipulated in their state-court settlement agreement that the RCO, originally a County ordinance, was not in effect for a brief period during the City's process of incorporation, as we have previously noted, *supra* n.2. This fact is relevant to the timeliness of the suit. Nonetheless, for the purposes of considering the Park Owners' investment-backed expectations, the district court found that the RCO had, for all practical purposes, been in effect "unchanged in substance, for all times relevant to the present action."

the property as part of protected "coastal wetlands" upon which development would be limited. *Id.* The Rhode Island Supreme Court held that Palazzolo could not, therefore, bring a takings claim because "[a] purchaser or a successive title holder like [Palazzolo] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 626. As the Supreme Court described the state high court's reasoning, "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased . . . with notice of the limitation." *Id.*

The Supreme Court reversed:

> The State may not put so potent a Hobbesian stick into the Lockean bundle . . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627-28.[21] Further, the Court pointed out that "[t]he State's rule would work a critical alteration to

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[21] The Court limited its reasoning to regulatory takings claims; physical takings claims resulting from a state's direct condemnation of property were distinguished as properly brought only by the property owner at the time of the condemnation. 533 U.S. at 628.

the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. . . . A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 627.

The Court's concern, that a rule precluding post-enactment purchasers from bringing a regulatory taking claim would undesirably insulate the government from liability and allow the state to "secure a windfall for itself," *id.* at 627, is particularly salient on the facts before us. In 2002, the City of Goleta adopted the County's RCO, created to manage housing problems as they existed in 1979, apparently without any formal consideration of whether the problems still existed. Were the fact that the Park Owners purchased the Park when the County RCO was already in existence sufficient to bar their takings claim, the City of Goleta would be insulated from liability for the effects of adopting the RCO when the City incorporated in 2002. All of the existing park owners at that time had bought their parks when the land was still part of unincorporated Santa Barbara County. Unless any of these park owners had purchased their park prior to the original RCO enactment in 1979, all the park owners would have purchased with notice of the original RCO. By its own theory, the City was free to adopt the law with complete impunity, notwithstanding its obvious effects.

The *Palazzolo* Court explained why subsequent property owners do not lose their right to challenge the government's actions:

> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.,* at 860 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.,* at 834, n.2.

Palazzolo, 533 U.S. at 629 (internal citations omitted). The Court also rejected analogies between purchasing a property subject to a challenged land-use regulation and purchasing a property whose contours are shaped by background principles of state law:

> It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.
>
> . . . A regulation or common-law rule cannot be a background principle for some owners but not for others.

> . . . A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

Palazzolo, 533 U.S. at 629-30. The Court concluded by remanding for consideration of Palazzolo's *Penn Central* claim, stating, "[t]hat claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630.[22]

[16] We have held that *Palazzolo* permits property owners who have purchased property subject to the regulations they challenge to bring regulatory takings claims under *Penn Central*. *See Equity Lifestyle*, 548 F.3d at 1190 (rejecting the county's argument that the property owner could not bring a takings claim because the owner acquired its interest in the property after the ordinance was passed because "a regulatory takings claim 'is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction' " (quoting *Palazzolo*, 533 U.S. at 630)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002) (holding that "[t]he Court's decision last Term in *Palazzolo* indicates that in some circumstances a purchaser

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[22] Finally, we note that even before *Palazzolo*, the Supreme Court permitted property owners who purchased property subsequent to the enactment of the challenged regulation to bring regulatory takings claims. In *Penn Central* itself, one of the appellants, Union General Properties, acquired its leasehold interest in Grand Central Terminal in 1968, a year after the Terminal was designated as a landmark in 1967. *Penn Central*, 438 U.S. at 115-16.

may have a valid takings claim even if his or her purchase price was discounted to reflect existing land-use regulations," and that *Palazzolo* applied to regulatory but not physical takings claims). Our sister circuits have also observed in dicta that *Palazzolo* permits post-enactment purchasers to prevail on regulatory takings claims. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 34 n.5, 37 (1st Cir. 2002) (en banc) (describing the *Palazzolo* holding as "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations"); *Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002) (analogizing from *Palazzolo* to find that a plaintiff company's claims against another survive the plaintiffs acquisition by another entity).

[17] *Palazzolo* left open the question of how to apply the "investment-backed expectations" analysis to property owners who purchased subject to the regulation. It merely remanded the case with instructions to address the merits of Palazzolo's claim under *Penn Central*. 533 U.S. at 630. Our sister circuits have yet to address the issue. *Penn Central* will not aid us because it never supplied "any 'set formula' " in the first place. *Penn Central*, 438 U.S. at 124. Instead, it "identified several factors that have particular significance" in what the Court described as an "ad hoc, factual inquir[y]." *Id.* After *Palazzolo*, we must continue to consider "[t]he economic impact of the regulation on the claimant" and the "character of the governmental action," *id.*, but we must not deem a regulatory takings claim forfeited simply be-

cause the property changed hands after the regulations went into effect.[23]

[18] We read *Palazzolo* to mean that even though the Park Owners purchased the Park in a regulated state similar to the one imposed by the City, the Park Owners may still prevail under *Penn Central*. How we are to apply *Penn Central* post-*Palazzolo* is less clear. The question of investment-backed expectations yields mixed results. On the one hand, as the district court found, the Park Owners' "expectations of the value of the Park when purchased, as well as the income to be received from the Park, should have been, at all times, tempered by the knowledge that the RCO would have an adverse effect on their investment." On the other hand, when the Park Owners acquired the property, they also arguably acquired the prior owner's interest in the property, including the right to bring a takings action. *See Palazzolo*, 533 U.S. at 627; *see also CAMSI IV v. Hunter Tech. Corp.*, 282 Cal. Rptr. 80, 85 (Cal. Ct. App. 1991) ("the harm implicit in a tortious injury to property is harm to the property itself, and thus to any owner of the property once the property has been injured and not necessarily to a particular owner"). At the very least, the Park Owners have

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[23] We thus do not disagree with the dissent's statement that *Palazzolo* does not suggest that the mere "transfer of title revives dead claims." Dissenting Op. at 13880. But as Justice Kennedy stated in *Palazzolo*, "the postenactment transfer of title" ought not "absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." 533 U.S. at 627 ("[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.").

the right to bring a takings action based on the City's 2002 adoption of the RCO.

[19] These two interests are in tension and are, in some respects, self-referential: The new owner's investment-backed expectation depends on the value of any takings claim, but whether there is a regulatory taking turns on the owner's investment-backed expectations. In other words, in this context we cannot address the investment-backed expectation prong of *Penn Central* without referring to the merits of the takings claim, but in order to decide the takings claim, we must determine the Park Owners' investment-backed expectations.[24] There is no easy way out of this conundrum. For now we will acknowledge the dilemma: the Park Owners took possession of the Park knowing that it was subject to the County's (but not the City's) RCO. They also assumed ownership with some hope that they would be able to challenge the RCO under the Takings Clause and, as

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[24] Judge Kleinfeld is concerned that the current mobile home tenants may not have received a windfall from the City's adoption of the RCO because they invested in reliance on the City's ordinance. Dissenting Op. at 13881-82. These are fair concerns that might be implicated if the City repealed the RCO in the future. *See Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). On the other hand, as Justice O'Connor explained, the alternative is that "the State wields far too much power to redefine property rights upon passage of title." *Id.*; *see also id.* at 636-37 (Scalia, J., concurring). We do not think concerns over windfalls (or not) go to whether there has been a taking.

These are difficult questions, ones that—so far as we know—are uncharted. To the extent these questions are relevant, they should be addressed by the district court in the first instance.

they have done here, on equal protection, due process and state law grounds. We conclude, therefore, that the question of investment-backed expectations is not determinative but must be considered in tandem with the economic impact of the regulation on the Park Owners, and the character of the governmental action. *See Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine.").

3

[20] The final consideration is "the character of the governmental action." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). We have seen two divergent interpretations of this test, both of which appear to derive from different portions of *Penn Central*. We consider each in turn.[25]

One test, applied less frequently in practice, considers "whether [the governmental action] amounts to a physical invasion or instead merely affects prop-

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[25] The district court applied yet a third version, whether there was anything "sinister in the purpose of," or "suspect" or "pretextual" about the regulations. The court's use of this test in a *Penn Central* analysis was in error, although the test may be relevant to a due process or equal protection claim. The district court evidently imported this requirement from our discussion in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), *overruled in part on other grounds as stated in Crown Point*, 506 F.3d at 853-56. That discussion, in which we considered whether the city's stated purpose in passing a housing code was a pretext for other, less noble purposes, was in the context of an Equal Protection claim that the housing code unfairly targeted certain property owners. *See Armendariz*, 75 F.3d at 1326-27. We did not consider the city's purpose when undertaking our takings claim analysis.

erty interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.' " *Lingle*, 544 U.S. at 538 (quoting *Penn Central*, 438 U.S. at 124). The application of this test to our case is controlled by *Yee*, in which mobile home park owners claimed that a rent control ordinance almost identical to the RCO amounted to a physical taking under *Loretto*. *See* 503 U.S. at 529-30. The Supreme Court held that the rent control ordinance did not amount to the imposition of a physical invasion. *Id.* The Court, however, proceeded to state in no uncertain terms that the fact that the regulations caused a one-time wealth transfer from landlord to the incumbent tenants "might have some bearing on whether the ordinance causes a *regulatory* taking." *Id.* at 530.

The district court thought "the character of the governmental action is less like a *per se* taking and more like a permissible shifting of economic benefits and burdens." We disagree. Although we understand that the RCO does not amount to a physical taking, the RCO is substantially more like a "regulatory taking," *Yee*, 503 U.S. at 530, than a "mere[diminution of the Park Owners'] property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). The RCO is quite unlike zoning or other restrictions that apply broadly to businesses and residences and inevitably restrict the property's uses. The Court has explained that its various formulations of the test for regulatory takings "(reflected in *Loretto*, *Lucas*, and *Penn Central*) . . . aim[ ] to identify regulatory actions that are functionally equivalent to the classic taking." *Id.* The RCO effects a transfer of the right to rents for the

use of the property from the Park Owners to the tenants. The Park Owners may own the property on which the mobile homes rest, but under the RCO the tenants have the right to convey the home with the right to remain on the site at a much-reduced rent. This looks much more like a classic taking than a mere regulatory burden. This iteration of the "character of the governmental action" test weighs in favor of the Park Owners.

The second, more frequently applied iteration of the "character of the governmental action" test considers whether the challenged regulation places a high burden on a few private property owners that should more fairly be apportioned more broadly among the tax base. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("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."); *see also Lingle*, 544 U.S. at 542-43 (discussing Armstrong with approval); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (applying *Armstrong* in a regulatory takings claim); *Penn Central*, 438 U.S. at 123.

We find *Cienega Gardens* persuasive as to the application of the *Armstrong* analysis in this case. *See* 331 F.3d at 1338. *Cienega Gardens* found a *Penn Central* taking where two federal statutes abrogated property developers' contractual rights to prepay their forty-year mortgage loans after twenty years. *See id.* at 1323-34. The effect of the statutes was to prevent the developers from exiting the low-rent housing programs in which they were required to participate while carrying the loans. *See id.* at 1323. These statutes led to a 96 percent loss of return on

equity for the developers. *Id.* at 1343. *Cienega Gardens* found that the government action at issue placed the expense of low-income housing on a few private property owners (those who had previously participated in the federal loan program but now wanted to exit), instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low rent apartments. *See* 331 F.3d at 1338-39.[26]

[21] Here, the RCO applies only to mobile home park owners. The district court found that the City did not impose comparable costs on any other property owners in the City, except as a condition of new development.[27] The City has singled out the Park

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[26] The City argues that *Cienega Gardens* involved an abrogation of the plaintiffs' contractual property rights whereas this case involves an abrogation of the Park Owners' right to charge market rental rates. This distinction is not relevant here. Regulatory takings cases necessarily involve economic analyses, in which the formal characteristics of the transaction are less relevant than the economic substance. For example, in this case, the fact that Park Owners are not allowed to raise rents could also be considered an abrogation of contract rights—their right to contract for annual market-based rent increases. Similarly, the case could be analogized (creatively) to a land-use extraction case: the Park Owners are only permitted to operate a mobile home park in exchange for an agreement to rent it at 80 percent below existing market rates (which in turn could be analogized as an extraction that they may rent 20 percent of the park at full market rates if they agree to permit 80 percent of the tenants to live rent-free). *See, e.g.*, *Yee*, 503 U.S. at 530 (suggesting that a mobile home rent control ordinance may be analogized to a land-use extraction and referencing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)).

[27] For new developers in Goleta, the burden is substantially less severe. Although the Park Owners must rent their entire property at an 80 percent discount, new developers are only

Owners and imposed solely on them a burden to support affordable housing. We find the Federal Circuit's reasoning persuasive and applicable to the facts of this case:

> Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA[28] and LIHPRHA[29]—preserving low-income housing—and method—forcing some owners to keep accepting below-market rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program.

331 F.3d at 1338-39; *see also Pa. Coal*, 260 U.S. at 416 ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . . [A] strong pub-

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[Footnote continued from previous page]

required to make 20 percent of their housing available at below-market rates.

28 The Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. § 17151, note (1988).

29 The Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. §§ 4101 *et seq.* (1994).

lic desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

[22] We do not doubt that the City's objective in passing the RCO was to increase the availability of low-cost housing. Singling out mobile home park owners, however, and forcing them to rent their property at a discount of 80 percent below its market value, "is the kind of expense-shifting to a few persons that amounts to a taking." *Cienega Gardens*, 331 F.3d at 1338-39. Moreover, the City has numerous alternatives for supporting affordable housing—such as tax incentives, low-cost loans, rent supports, or vouchers—without directing the burden at such a limited group. In sum, taking account of the "character of the governmental action" test in this case also weighs strongly in the Park Owners' favor.

C

[23] Having reviewed each factor individually, we must weigh them together. We conclude that the RCO has caused substantial economic hardship to the Park Owners. Property values in the area have increased by 225 percent in the time that the Park Owners have owned the Park, yet the Park Owners have not been permitted to increase rents beyond 75 percent of the annual increase in the CPI. This is a zero-sum game; loss to the Park Owners has become gain to their tenants. The RCO has forced the Park Owners to rent their property at an 80 percent discount below the market value, resulting in transfer premiums equal to approximately 90 percent of the selling price of a mobile home. Thus, the savings created by these below-market rents are transferred directly into the pockets of the incumbent mobile home

tenants, who can now sell their mobile homes for almost ten times their purchase price. *See Yee*, 503 U.S. at 530. Next, we agree with the district court that the RCO has not strongly interfered with the Park Owners' investment-backed expectations because the Park Owners purchased the Park when the Park was already regulated. Nevertheless, the mere fact that the Park Owners bought the Park in its regulated state does not mean that the City has not taken property by regulation or that the Park Owners cannot bring such a claim. *See Palazzolo*, 533 U.S. at 627-28. Finally, we conclude that the RCO looks more like a classic taking than a mere shifting of benefits and burdens, *see Yee*, 503 U.S. at 530, and that the RCO singles out mobile home park owners and forces them to bear a burden of providing affordable housing in the City that should fairly be born by the taxpayers as a whole. *See Armstrong*, 364 U.S. at 49.

[24] On balance, the City's RCO "goes too far" and constitutes a regulatory taking under the Fifth and Fourteenth Amendments for which just compensation must be paid. If the City of Goleta wishes to attempt to increase the availability of affordable housing by transferring the value of renting land within its jurisdiction from the Park Owners to the incumbent tenants, there is no constitutional impediment to doing so.[30] The Fifth Amendment of the U.S. Constitution, however, requires that the City compensate the Park Owners for taking their property by regulation.

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[30] The Park Owners have not claimed that the government action is impermissible because it fails to meet the "public use" requirement. *See Kelo*, 545 U.S. at 472.

IV

The Park Owners also ask us to strike down the RCO as a violation of the Due Process Clause. In *Lingle*, the Supreme Court clarified the difference between a challenge to a rent control ordinance as a takings claim and as a substantive due process claim, and affirmed the independent vitality of both theories. "[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference." *Lingle*, 544 U.S. at 537. As we have explained:

> Due process violations cannot be remedied under the Takings Clause, because if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Crown Point, 506 F.3d at 856 (quoting *Equity Lifestyle Properties*, 505 F.3d at 870 n.16 (citation omitted)). The Park Owners have raised two different theories to support their due process claim, which we address in turn.

A

[25] The Park Owners' more "traditional" due process theory is foreclosed by precedent. The Supreme Court and we have upheld rent control laws as rationally related to a legitimate public purpose. *See Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988); *Equity Lifestyle*, 548 F.3d at 1194; *Carson Harbor Village*, 37 F.3d at 472. In fact, we have already held that a mobile home park rent control ordinance similar to the one at issue survives a due process chal-

lenge. *See Carson Harbor Village*, 37 F.3d at 472. As in this case, the law challenged in *Carson Harbor Village* was ineffective at preserving low-income housing and merely caused a wealth transfer from the park owners to incumbent tenants. We held:

> A generally applicable rent-control ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances . . . . This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective.

Id. (internal quotation marks and citations omitted).

B

The Park Owners also raise a second due process theory: that the RCO is a denial of substantive due process because it fails to guarantee that they will earn a "fair and reasonable return" on their investment. For this claim, the Park Owners attack specifically RCO §§ 11A-5 and 11A-6. These sections detail the "automatic increase" of 75 percent of the CPI, and the procedures for requesting a "discretionary increase" where increased operating costs, capital expenses, and capital improvements are greater than the amount of the automatic increase. *See* RCO §§ 11A-5, 11A-6. The Park Owners argue that these provisions will necessarily lead to a time when the Park Owners are denied rent increases that permit a reasonable return on their investment. They also claim that the provisions are constitutionally infirm because they provide no mechanism by which Park

Owners can challenge such rent caps and secure a reasonable return.

1

The Park Owners rely on a thin, but viable line of cases. In *Sierra Lake Reserve v. City of Rocklin*, we considered another mobile home park rent control ordinance that, like the one at issue, imposed rent caps and caused a wealth transfer to incumbent tenants. 938 F.2d 951, 954 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992).[31] The plaintiffs argued that the provisions of the ordinance permitted only a passing through of increased costs, without allowing for a reasonable profit. *Id.* at 958 n.9. Reversing the district court's dismissal on a 12(b)(6) motion, we held that the park owner had alleged a viable substantive due process claim to the extent that the rent control ordinance deprived it of a "fair and reasonable" return on its investment by prohibiting rent increases designed to capture a return on investment in capital improvements:

> Under *Guaranty National [Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990)], every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a 'fair and reasonable' return must be allowed. Breaking even is not enough; the law must provide for a profit on one's investment. . . . To the extent plaintiff alleges that the rent increases allowed on account of capital im-

[31] Subsequent to a partial reversal by the Supreme Court on other grounds, we vacated a portion of *Sierra Lake*, but retained the portions relevant to this discussion. *See Sierra Lake Reserve v. City of Rocklin*, 987 F.2d 662, 663 (9th Cir. 1993).

> provements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process under *Guaranty National*.

Id. at 958 (internal citations omitted).

[26] The Park Owners' claim fails because they have only brought a facial challenge to the RCO. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [a challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Id*; *see also Keystone*, 480 U.S. at 493-95 (1987) (holding that, in a facial challenge, the issue is whether the "mere enactment of the [regulation] constitutes a taking").

[27] The Park Owners argue that the RCO necessarily denies them a just and reasonable return on their capital investments. This contention is belied by the text of the provision. Section 11A-5 provides that annual rent may be increased by 75 percent of the CPI (the "automatic increase"). The Park Owners, who are not satisfied with their RCO-prescribed rent increase may seek arbitration for more rent to cover actual expenses. Such rents are in addition to the automatic increase as a "just and reasonable return on investment." It is plain enough from this scheme that the RCO makes some allowance "for a profit on one's investment" and not "merely [an] offset [for] the cost of those improvements." *Sierra Lake*, 938 F.2d at 958. Although the RCO may not provide a full return on investment in every case, we

are satisfied that the RCO provides for a reasonable profit in at least some circumstances. We recognize that there may be some imprecision between what the RCO will provide as a return and what the Park Owners might consider a reasonable return, but the Due Process Clause does not demand a perfect fit between the economic regulatory scheme and its purpose. *See Reno v. Flores*, 507 U.S. 292, 305 (1993) (holding that the Due Process clause demands no more than a "reasonable fit" between governmental purpose and the means chosen to advance that purpose); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-89 (1955); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *Carson Harbor Village*, 37 F.3d at 472; *Morseburg v. Balyon*, 621 F.2d 972, 979-80 (9th Cir. 1980). Because there are circumstances under which the law would be valid, the Park Owners' facial challenge must fail. *See Salerno*, 481 U.S. at 745.[32]

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[28] The Park Owners also argue that the RCO violates due process because the provision provides no procedural "mechanism" by which they can file a grievance if they are not earning a just and reasonable return, such as a "discretionary application or

[32] Because the Park Owners' facial challenge fails we do not address whether the district court erred in holding that, as a threshold requirement to raise a "just and reasonable return" claim, the Park Owners must first prove that the government's actions were "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See Sierra Lake*, 938 F.2d at 957; *see also Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 581-82, 585-86 (1942); *Guar. Nat'l Ins.*, 916 F.2d at 513 (9th Cir. 1990).

provision." *See* RCO § 11A-5(i)(1) ("The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment."). This argument, while creative, is an end-run around the Park Owners' previous argument. It fails for the same reason we rejected the prior claim. Although the RCO may lack a process for adjusting the reasonable rate of return similar to the arbitration process for adjusting the discretionary increase to cover operating costs and capital expenses, the absence of a process is only relevant when the Park Owners can demonstrate they have actually been denied a reasonable return. This claim must be addressed as an as-applied challenge, not a facial challenge.

As an alternative argument, the Park Owners attempt to ease the "uphill battle" they face on their facial challenge, *Keystone*, 480 U.S. at 495, by arguing that they should be excused from having to go through the hearing provisions set out in the RCO under the "futility doctrine." Under the futility doctrine, a claimant may bypass the procedures for relief included in the challenged law if such procedures are shown to be "unavailable or inadequate." *Equity Lifestyle*, 548 F.3d at 1191 (quoting *Williamson*, 473 U.S. at 197).

[29] The futility exception applies only if the challenger has already attempted to use the state procedures "and has shown pursuit of such remedies would be futile." *Equity Lifestyle*, 548 F.3d at 1191. The record contains no evidence that the Park Owners have attempted to use the RCO procedures, much less proven them constitutionally inadequate. It would be mere speculation for us to accept the Park Owners' unsubstantiated claims that a request for a rent increase sufficient to secure a reasonable return would be denied. *See Yee*, 503 U.S. at 528 ("Because

petitioners do not claim to have run that gauntlet, . . . this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute."); *see also Equity Lifestyle*, 548 F.3d at 1191.

V

[30] Finally, the Park Owners argue that the RCO violates the Equal Protection Clause because it singles out mobile home park owners, as opposed to other sorts of housing providers, to bear the burden of an affordable housing program. This argument is governed by our decision in *Equity Lifestyle*. In that case, we held that a mobile home rent control ordinance does not violate the Equal Protection Clause because it is rationally related to the legitimate public interest of promoting affordable housing. *Equity Lifestyle*, 548 F.3d at 1195. This is true even if the statute singles out mobile home park owners, does not increase the amount of available affordable housing, and "serve[s] the sole purpose of transferring the value of [the park owners'] property to a select private group of tenants." *Id.* at 1193.

VI

[31] State and local governments have a legitimate interest in increasing the availability of affordable housing for their citizens. Translating that interest into effective public policy, however, has proven difficult. The Supreme Court and our court have addressed regulations like the City's RCO with some regularity; we have consistently questioned their ineffectiveness at increasing the availability of affordable housing, and we have commented on their pernicious side effects. *See, e.g.*, *Yee*, 503 U.S. at 530; *Sierra Lake*, 938 F.2d at 953-55; *Carson Harbor Vil-*

lage, 37 F.3d at 472-73; *cf. Richardson*, 124 F.3d 1150 (reviewing a condominium rent control ordinance with similar effects). Nevertheless, so long as these rent control ordinances are "designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances," the Constitution affords state and local governments the flexibility to experiment to find a workable approach to the problem. *Carson Harbor Village*, 37 F.3d at 472. We therefore affirm the district court's findings that the City's RCO does not, on its face, violate the Due Process Clause or the Equal Protection Clause.

When such ordinances "go[ ] too far," however, and require some property owners to support policies that "in all fairness and justice, should be borne by the public as a whole," the Constitution requires that the government provide just compensation. *Lingle*, 544 U.S. at 537 (citation omitted). The *Williamson* prudential ripeness requirements have, for the most part, forced us to close the courthouse door to aggrieved property owners like the Park Owners, and to close our eyes to the extreme effects of laws like the City's RCO. The Park Owners, however, have managed to pry these doors open a bit by developing their case through three rounds of litigation in state and federal court, and the City has forfeited any objection that the case is not fit for review. We will not, therefore, throw these property owners back out and slam the courthouse door shut behind them. Today, our eyes are open. We have weighed the *Penn Central* factors, and we find that the RCO has effected a regulatory taking. Just compensation is due.

[32] We therefore reverse the district court's judgment on the takings claim and remand to the district court for further proceedings. On remand, the district court may of course consider any materials presented by either party that are relevant to determining the total amount of just compensation due to the Park Owners. *See*, *e.g.*, *Cienega Gardens*, 331 F.3d at 1354. As noted in Part IIIA.1, the district court here did not consider the detailed figures included in either of the expert reports presented before it, possibly because it found that such evidence was precluded under a facial takings challenge under *Penn Central*. We have now held that a facial challenge under *Penn Central* exists as a viable legal claim, *see supra* pp. 13839-40, and affirmed that this court's precedents and the nature of a takings inquiry allow for some evidence outside the text of the statute to be admissible. *Id.* at 13840-43. The district court may therefore properly consider such "detailed figures," in addition to any other evidence it deems relevant, in conducting its analysis to ascertain the precise amount of just compensation owed to the Park Owners. *See*, *e.g.*, *Richardson*, 124 F.3d at 1154 n.2 (noting that an example using exact dollar amounts is "illustrative" of the economic impact of the regulation in a facial challenge).

Costs shall be awarded to the Appellants.

AFFIRMED in part, REVERSED in part, and REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

I agree with the majority that the prudential ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[1] does not preclude a decision on the merits, and I agree with the majority that the rent control ordinance would amount to a regulatory taking under *Penn Central Transportation Co. v. New York City*,[2] were it not a re-enactment of one already in effect when the Guggenheims purchased the trailer park. But I cannot agree that there was a taking of anything for which the Guggenheims would be entitled to compensation, because they purchased the park after the regulatory takings that mattered.

The challenged rent control ordinance was first passed by Santa Barbara County (the "County") in 1979, and revised in 1987. The Guggenheims bought the trailer park in 1997, which was, at the time, located in an unincorporated part of the County. When the Guggenheims bought the trailer park, the County had long since taken away much of the rising value of the fee from the landlord and given it to the tenants who then owned trailers at the park. By 1997 the purchase price of the trailer park reflected the lower value of the trailer park to the landlord under the ordinance.[3] All the Guggenheims paid for was a trailer park burdened by the rent control ordinance. And when they bought, the statute of limitations had long since run on any takings claims arising from the County's 1979 and 1987 rent control ordinances.

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1 473 U.S. 172 (1985).

2 438 U.S. 104 (1978).

3 Majority op. at 13850-51.

The parties have stipulated that there was a short period during the day of February 1, 2002—the day the City of Goleta (the "City") was incorporated—when the County rent control ordinance did not apply. Later that same day, pursuant to California statute, the City re-adopted the rent control ordinance.[4] Accordingly, the Guggenheims' lawsuit is not barred by the statute of limitations because they challenge the City's adoption, as part of its incorporation, of the County rent control ordinance, which followed the brief period when the ordinance was not in effect. Because the ordinance amounts to a regulatory taking, and not a physical taking,[5] the Guggenheims' challenge must be analyzed as regulatory taking.

We disagree on how to apply the controlling Supreme Court decision, *Palazzolo v. Rhode Island*.[6] In that case, a single shareholder owned a corporation that held land burdened by regulations.[7] When the corporation was dissolved, title to the burdened land

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4 California code requires a newly incorporated city to adopt "prior to performing any other official act, [ ] an ordinance providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation, or until the city council has enacted ordinances superseding the county ordinances, whichever occurs first." Cal. Gov't Code § 57376. The City did this on February 1, 2002. On April 22, 2002, the City re-adopted the entire County Code, including the rent control ordinance, for an indefinite period, subject to the City's power to amend, repeal, or modify the Code.

5 *Yee v. City of Escondido*, 503 U.S. 519 (1992).

6 533 U.S. 606 (2001).

7 *Id.* at 613-14.

passed to the sole shareholder by operation of law.[8] The government claimed that because the sole shareholder, the plaintiff, did not own the land when its use was restricted, he had no claim for compensation on account of any taking that had occurred when his corporation held title.[9] In this factual circumstance, the Court held that the plaintiff could pursue a claim for compensation, 5 to 4. Five justices wrote for the Court that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[10] Justice O'Connor's concurrence states that the claim was not barred in the circumstances presented in that case. [11] Her stated rule rejects treating a change of ownership before or after the enactment of the regulation as per se barring or not barring a takings claim.[12] Instead, courts "must attend to those circumstances which are probative of what fairness requires in a given case.[13] The four dissenters and Justice O'Connor agreed that acquiring title after the taking could bar a takings claim.[14]

In *Palazzolo*, the transfer of title (by operation of law) had no effect on the wealth of the plaintiff. He merely gained personal title to what he previously

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8 *Id.* at 614.

9 *Id.* at 616.

10 *Id.* at 630.

11 *Id.* at 635-36 (O'Connor, J., concurring).

12 *Id.* at 633, 636.

13 *Id.* at 635.

14 *Id.* at 641 (Stevens, J., concurring in part and dissenting in part); *id.* at 654 n.3 (Ginsburg, J., dissenting); *id.* at 654-55 (Breyer, J., dissenting).

owned as 100% shareholder of the corporation which held title.[15] By contrast, in this case, the Guggenheims bought the trailer park at a price presumably reflecting the impact of the rent control on the prior owners, a price lower than what they would have had to pay without the rent control ordinance. The Guggenheims purchased at arms length a trailer park already devalued by rent control. The land in *Palazzolo* was devalued by the challenged regulations while the plaintiff owned the impacted economic interest as a 100% shareholder in the corporation holding the land.[16]

We have two decisions on point. *Daniel v. County of Santa Barbara* holds that although *Palazzolo* rejects a rule that a purchaser who is aware of existing land-use regulations may never pursue a takings claim, it "did not adopt the converse of that rule," that the successor could always recover.[17] *Daniel* distinguishes *Palazzolo* on two grounds. One is that *Palazzolo* was a regulatory taking (as is the case at bar), while *Daniel* was a physical taking.[18] The second is that "the full value of the [taking] had already been taken from the *Daniel*s' predecessors, it took nothing of value from the *Daniel*s."[19] This second ground applies to the case at bar.

Equity Lifestyle Properties, Inc. v. County of San Luis Obispo involved another trailer park rent con-

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15 *Id.* at 614 (majority opinion).

16 *Id.*

17 288 F.3d 375, 384 (9th Cir. 2002).

18 *Id.*

19 *Id.*

trol ordinance.[20] Our decision in that case discusses, but explicitly declines to decide whether a plaintiff who had purchased after the ordinance went into effect had a claim under *Palazzolo*.[21] Instead, it rejects the takings claim as barred by the statute of limitations.[22] Since the takings claim failed on an another ground, *Equity Lifestyle* did not need to distinguish *Daniel*.

Our case fits the second *Daniel* distinction from *Palazzolo*, "[b]ecause the full value of the [taking] had already been taken from the *Daniel*s' predecessors, it took nothing of value from the *Daniel*s."[23] It also fits the limitation Justice O'Connor imposed in *Palazzolo*. Her opinion, and *Daniel*, would both have us "attend to those circumstances which are probative of what fairness requires in a given case."[24] Since the Guggenheims benefitted from a lower purchase price reflecting the burden of the rent control ordinance when they bought the trailer park, fairness does not require that they be compensated. Taking from Peter does not require giving compensation to Paul.

If this were a new rent control ordinance and a previous owner had transferred the trailer park to the Guggenheims before the statute of limitations had barred the seller's claim, then this might be an actionable case. But it is not. The naked wealth transfer was in the 1970's. The 2002 re-adoption was

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[20] 548 F.3d 1184 (9th Cir. 2008).

[21] *Id.* at 1190 n.11.

[22] *Id.* at 1193 & n.15.

[23] *Daniel*, 288 F.3d at 384.

[24] *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

merely a ministerial re-enactment that did not transfer wealth from the Guggenheims.

Or, if there had been a substantial period of time, instead of less than one day, when the rent control ordinance had not been in effect, and if the Guggenheims had bought at a price reflecting freedom to charge market rents, they might have suffered an impairment of their investment-backed expectations or a negative economic impact.[25] But that is a hypothetical circumstance neither argued nor, on the facts of this case, arguable. There is nothing in the record to support the notion that the Guggenheims' interest in the trailer park was worth more before than after the City reenacted the County ordinance.[26] The reenactment had no economic impact on the Guggenheims.[27]

The Guggenheims cannot demonstrate any investment backed expectations that were harmed by the 2002 reenactment of the ordinance unless they breathe life into the takings claims that prior owners never brought. When the prior owners let the statute of limitations run without challenging the 1970's ordinance and the 1987 reenactment, their claim expired. *Palazzolo* does not undermine the rule that "a takings claim must [ ] comply with timeliness requirements."[28] The time-barred claims could not es-

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[25] *See supra* note 4 and accompanying text.

[26] *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998).

[27] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (quoting *Penn Central*, 438 U.S. at 124).

[28] *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008).

tablish investment backed expectations. *Palazzolo* does not suggest that a transfer of title revives dead claims. Instead, *Palazzolo* holds that transfer of title will not necessarily bar a takings claim, a quite different proposition. In one case, there is no longer a claim and in the other, there is a claim that has changed hands.

The Guggenheims purchase of the trailer park in 1997 did not breathe life into the dry bones of the takings claim that had died years before.[29] As the majority opinion concedes, the Guggenheims "got exactly what they bargained for when they purchased the Park-a mobile-home park subject to a detailed rent control ordinance."[30] The City took nothing from what they bought.

The third factor analyzed by the majority, the "character of the government action,"[31] is a continuation of the old ordinance, the same one that applied when the Guggenheims bought the trailer park. The brief gap and readoption did not reapportion public burdens, as did the 1987 and 1979 ordinances.[32]

Because the rent control ordinance did not harm the Guggenheims, they do not have a regulatory takings claim under *Penn Central Transportation Co. v. New York City*,[33] or the test Justice O'Connor set forth in *Palazzolo*, which forces us to consider "what

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[29] *Ezekiel* 37:1-14 (King James).

[30] *See Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124).

[31] *Id.* (quoting *Penn Central*, 438 U.S. at 124).

[32] *Armstrong v. United States*, 364 U.S. 40, 49 (1960)

[33] 438 U.S. 104 (1978).

fairness requires in a given case."[34] Fairness cuts the other way.

Unfairness arises in this case in quite another quarter because of the market distortions created by the rent control ordinance during the years after its enactment in 1979. As the majority explains, the rent control ordinance has had the effect of raising the average price of a trailer in the park by $105,054, 88% of the sale price.[35] But for the rent control ordinance, the average trailer would be worth only $14,037. The people who really do have investment backed expectations in this circumstance are those who have bought trailers since rent control went into effect. Tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The present tenants lost nothing on account of the City's reinstitution of the County ordinance. But they would lose, on average, over $100,000 each, if the rent control ordinance were repealed. They have no legal protection against repeal, and have invested, essentially, in reliance on the stability of government decisions that create market distortions.[36] Repeal would not

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[34] *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

[35] Majority Op. at 13837 n.11.

[36] *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) (holding that "[r]easonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation of such expectations cannot give rise to a Fifth Amendment claim."); *see also Nat'l Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997);

amount to a taking, but continuation of the ordinance deprives no one, not the plaintiffs and not the tenants, of any compensable value.

[Footnote continued from previous page]

Peterson v. U.S. Dep't of Interior, 899 F.2d 799, 812-13 (9th Cir. 1990).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; MAUREEN H. PIERCE,	)	CV 02-2478 FMC (RZx)
	)	**JUDGMENT**
Plaintiffs,	)	
vs.	)	
CITY OF GOLETA,	)	
Defendant.	)	

This matter came before the Court, the Honorable Florence-Marie Cooper, United States District Judge, presiding, on April 3, 2006, on Plaintiffs' Motion for Partial Summary Judgment. Subsequent to its denial of said Motion and upon its review of the parties' Motions in Limine in anticipation of the impending trial, as well as the parties' proposed Pre-Trial Order, the Court issued an Order to Show Cause as to why the Court should not, on its own motion, enter Summary Judgment in favor of Defendant. Having reviewed the parties' briefing in response to the Order to Show Cause, the Court concludes that Defendant is entitled to Judgment as a matter of law on all of Plaintiffs' remaining causes of action.

Because this is a facial challenge to the ordinance in question, the evidence Plaintiffs seek to offer at trial vis a vis their Fifth Amendment takings clause claim is irrelevant. To facially attack the ordinance as an uncompensated "taking," Plaintiffs must demonstrate that the mere enactment of the ordinance constitutes a taking.

In *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), zoning ordinances were challenged as facially unconstitutional because they resulted in a taking of plaintiffs property. The Court explained that the test to be applied in considering a facial challenge is quite simple: a statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." *Id.* at 260; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 94 L. Ed. 2d 472 (1987) ("The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . . .") (internal quotations omitted). Plaintiffs "thus face an uphill battle in making a facial attack on the [ordinance] as a taking." *Keystone*, 480 U.S. at 495. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Courts are strongly discouraged from declaring statutes invalid as a result of a facial challenge. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295, 101 S. Ct. 2352 69 L. Ed. 2d 1 (1981). The finding that a statute, on its face, could

not be constitutional under any set of circumstances, will rarely be made. The constitutionality of statutes should not be decided in a vacuum—i.e., absent an actual factual setting allowing for an ad hoc inquiry. *See id.* Courts are to examine factors such as the economic impact of the regulation and its interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). However, the development of a record sufficient to allow such analysis only occurs in an as-applied challenge, with its attendant administrative exhaustion requirements. *See*, *e.g.*, *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 358, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87, 105 S.Ct. 3108, 87 L. Ed. 2d 126 (1985).

Plaintiffs here argue that they can establish denial of economically viable use of their land, with evidence that they do not receive a fair return on their investment under the City's ordinance. The same argument was made in the context of a facial challenge in *Lake Nacimiento Ranch v. San Luis Obispo County*, 841 F.2d 872, 878 (9th Cir. 1987) and discounted by the Court. *Cf. William C. Haas & Co. v. San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) ("That the zoning restrictions prevent Haas from recovering its investment does not mean that they are constitutionally defective. . . .").[1] Indeed, by focusing

[1] Hass involved an as-applied challenge to City of San Francisco zoning regulations which limited the maximum height of buildings. Hass, a developer who purchased property in the affected area prior to their enactment, maintained that the regulations effected a "taking" because, with the burden of the

exclusively on the issue of whether *they* can receive a favorable return on *their* investment, the Court believes that Plaintiffs have impermissibly attempted to convert this action, *de facto*, into an as-applied challenge. *See*, *e.g.*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) ("In facial takings claims, our inquiry is limited to whether the mere enactment of the [regulation] constitutes a taking. For that reason, we look only to the regulation's general scope and dominant features, rather than to the *effect of the application of the regulation in specific circumstances*.") (internal quotations and citations omitted) (emphasis added). As the Court recognized in its consideration of the summary judgment motion, the express provisions of the ordinance *do* allow for a potential for a fair return on capital expenses to some potential owners, if not Plaintiffs in particular. *See* Order Denying Motion for Partial Summary Judgement, April 4, 2006, at 18:16-23; *see also* City of Goleta's Response to Order to Show Cause, at 4-6. Accordingly, circumstances exist under which the ordinance may be Constitutionally valid, such that Plaintiffs' facial challenge simply cannot succeed.

In any event, as *Hass* instructs, even had Plaintiffs brought an as-applied challenge , mere loss of an opportunity to recoup profit expectations is not necessarily sufficient to constitute a taking. *Hass*, 605 F.2d at 1121 ("Of course, Haas would not have paid as much for the property as it did if it had known that it would not be able to build high-rises on it.

[Footnote continued from previous page]

height restrictions, there was no remaining "economically viable" use for its property.

But its disappointed expectations in that regard cannot be turned into a taking . . . .”). Plaintiffs’ position in this case is even weaker than that of the plaintiff in *Hass* since, as noted in the Court’s April 4, 2006 Order, they purchased their property when the City of Goleta’s ordinance was already in effect.

Finally, in *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L. Ed. 2d 153 (1992), mobile home park owners claimed a local rent-control ordinance violated the takings clause. The Supreme Court concluded that, on their face, the laws at issue only regulated the *use* of land, by regulating the relationship between landlord and tenant. Such regulation does not amount to a taking. The allegation, also made here, that the effect of the law was a transfer of wealth from landlords to tenants, (while more obvious where, as here, the tenants may sell their homes at a premium) did not convert regulation into physical invasion. *Id.* at 1529.

Plaintiffs also contend that the provisions of the ordinance, which impair their ability to obtain full reimbursement for capital and other expenditures, deprive them of a fair and reasonable return on their investment in violation of substantive due process, citing *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d. 951, 957-58, (9th Cir. 1992), *vacated in part on other grounds*, 987 F.2d 662 (9th Cir. 1993). The fallacy in this argument is that it ignores the threshold requirement that “[t]o establish a violation of substantive due process, [plaintiffs] ‘must prove that the government’s action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’” *Id.* (quoting *Sinaloa Lake Owners Asso. v. Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (quoting *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926))).

As this Court previously held, there is no evidence of arbitrary or unreasonable conduct on the part of the government in enacting the ordinance in this case. Plaintiffs rely on language in *Sierra Lake*, *supra*, to the effect that they could establish a due process claim if they demonstrated a deprivation of a fair and reasonable return on investment. However, that language and analysis followed the court's conclusion that it was "well within the realm of possibility" that plaintiff could establish that the government's conduct was wrongful or arbitrary. Having failed to meet that threshold requirement in this case, Plaintiffs' evidence of their actual rate of return is irrelevant.

Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is entered in favor of Defendant. Defendant shall have and recover its costs of suit pursuant to Fed. R. Civ. P. 54(d)(1) and Local Rule 54.

September 5, 2006

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Daniel Guggenheim, et al.,	)	**CV 02-02478 FMC (RZx)**
Plaintiffs,	)	**ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT;**
vs.	)	
City of Goleta,	)	**ORDER DENYING EX PARTE APPLICATION FOR CONTINUANCE.**
Defendant.	)	

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment (docket #40). The Court has read and considered the moving, opposition, and reply documents filed in connection with this Motion.

The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for November 1, 2004, is removed from the Court's calendar.

Defendants have filed an Ex Parte Application seeking a continuance of the November 1, 2004, hearing. Because the Court deems the matter ap-

propriate for decision without oral argument, Defendants' request is moot. It is denied for that reason.[1]

For the reasons and in the manner set forth below, the Court grants Plaintiffs' Motion. The Court grants summary judgment in favor of Plaintiffs as to their claim brought pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution. In light of the Court's holding that the challenged ordinance is unconstitutional under the Takings Clause, the Court does not consider Plaintiffs' due process and equal protection challenges.

I. Background

A. Nature of the Case

This action arises out of a the adoption of a mobile home rent-control ordinance by the recently incorporated City of Goleta ("the City"). Plaintiffs are mobile-home park owners with properties that are subject to the rent-control ordinance.

B. The Court's October 3, 2003, Order

The Court, in its October 3, 2003, Order, previously considered a number of legal issues relevant to the claims addressed by the present Motion. Specifically, the Court narrowed the scope of Plaintiffs' takings claim to a facial challenge to the rent-control ordinance, holding that any "as-applied" challenge to

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[1] The Ex Parte Application advised the Court of the pendency of a request for rehearing en bane of a Ninth Circuit decision that addresses the Takings Clause question at issue in this Motion. It also advised the Court that the United States Supreme Court has granted certiorari on a case that addresses this issue. Nevertheless, the Court sees no need to delay the issuance of the present Order based on speculation that Ninth Circuit law regarding this issue may change.

the ordinance was not ripe because Plaintiffs had not sought "just compensation" through a state inverse condemnation claim. (Oct. 3, 2003, Order at 6-8). Based on this holding, the Court rejected the argument that Plaintiffs' substantive due process and equal protection' claims were not ripe. *Id.* at 11-12.

The Court also rejected the argument that Plaintiffs' claims were barred by the statute of limitations, holding that although the ordinance was a mere re-enactment by the newly incorporated City of an ordinance that had been previously in effect as a County ordinance, the re-enactment started anew the limitations period applicable to Plaintiffs' constitutional claims. *Id.* at 8-9.

Finally, the Court also rejected an argument that Plaintiffs lacked standing, due to their lack of injury, because they became mobile-home park owners after the County enacted its ordinance, noting that the ordinance should be viewed as newly adopted by the City upon its re-enactment. *Id.* at 10-11.

The Court declined to exercise supplemental jurisdiction over the related state-law claims, and dismissed those claims without prejudice to their being refiled in state court. The Court then stayed the action under the *Pullman* abstention doctrine[2] pending resolution of Plaintiffs' state-law claims.

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2 "*Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

C. The State-Court Action

The parties have since settled their state-law claims. As part of the settlement, the parties entered into a stipulation, which the Court has entered as an order in this action. This stipulation provides, *inter alia*, that neither party shall appeal from the Court's October 3, 2003, Order, and that Plaintiffs' claims were asserted within the relevant limitations period.

II. Uncontroverted Facts

Plaintiffs purchased Rancho Mobile Estates Mobilehome Park ("the Park") in what is now Goleta (formerly an unincorporated area of Santa Barbara County), California, in 1997. The County of Santa Barbara had a mobile home rent control ordinance in place for unincorporated areas of the County since approximately 1987. The Park was subject to the Santa Barbara Ordinance while the Park was in the unincorporated area. The City of Goleta adopted mobile home rent control as part of a generalized adoption (and subsequent readoption) of the Santa Barbara County Code when the City was created. There was a gap in time when no rent control was in effect as to the Park owned by Plaintiffs.

The express purpose of the ordinance is set forth in the Goleta City Code:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the

> County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the County of Santa Barbara. Because of such factors and the high costs of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county[3] of Santa Barbara.

Goleta City Code, § 11A-1. The City does not require any other existing property owners to contribute to or subsidize affordable housing in the City, except as a condition of new developments.

The ordinance limits any annual increase in rents at the Park to the lesser of 75% of the increase

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[3] Based on the wholesale adoption of the Santa Barbara County Code by the City of Goleta, the Court is satisfied that the City Council intended this ordinance to apply to area that was incorporated as the City of Goleta.

in the Consumer Price Index ("CPI") or 5%. The ordinance also contains a vacancy control provision, which limits to 10% the increase in rent when a mobile home is sold. The ordinance has a discretionary rent increase application process whereby Plaintiffs may request additional rent increases, but these increases are limited to those that are needed to reimburse the Park for increased costs.

During the time that Plaintiffs have owned the Park, housing costs in the City have increased approximately 225%. Because of the rent-control ordinance, the rents charged by Plaintiffs have not kept pace with this increase. The result of the existence of lower-than-market value rents has resulted in the ability of mobilehome owners to sell their homes at a significant premium. According to the analysis of Plaintiffs' expert, based on the sale of 64 mobile homes from January 15, 1999, through July 21, 2004, the premium amounted to, on average, 88% of the sale price. (Quigley Report at T-2, attached as Ex. 7 to the Quigley Declaration). In other words, an average mobile home worth $12,000 would sell for approximately $100,000. The City has acknowledged the existence of such a premium. *See* Stouder Depo.[4] at 120, 142-43.)

III. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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[4] Mr. Stouder was designated by the City, pursuant to Fed. R. Civ. P. 30(b)(6), as the "person most knowledgeable" regarding the rent-control ordinance.

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348,89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *See Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995).

III. Takings Claim

The uncontroverted facts establish the existence of a premium on the sale of mobile homes as a result of the rent-control ordinance. Absent a mechanism to keep those who sell their mobile homes from reap-

ing this benefit, the ordinance is an unconstitutional taking under Ninth Circuit law.

In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the court considered an ordinance that controlled the rent increases of land, subject to long-term leases, upon which condominiums were built. The City of Honolulu passed an ordinance that restricted the intervals at which the rent of land could be renegotiated (15-year, 10-year), and tied the maximum rent increase to the Consumer Price Index.[5] *Richardson* was decided at the summary judgment stage. The evidence showed that the rent-control ordinance affected the price of the condominiums. The seller could demand a higher price for the condominium because it was on rent-controlled land. The Ninth Circuit invalidated the ordinance on constitutional grounds. The court held that the rent-control ordinance constituted an unconstitutional taking because it failed to substantially further the goal of creating affordable housing due to the premium paid by the buyer to purchase a condo on rent-controlled land:

> [The challenged ordinance] does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent[,] in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing . . . . Incumbent owner occupants who sell

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[5] This ordinance is similar to the ordinance at issue in this case, and in both situations, the structure built or placed on the land is owned by the lessee, but the land is leased.

> to those who intend to occupy the apartment will charge a premium for the benefits of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.

Id. at 1165-66.

Two more recent Ninth Circuit opinions have reaffirmed this central holding of *Richardson*. First, in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), the Ninth Circuit held unconstitutional a rent-control ordinance with the stated purpose similar to the one at issue here. *Id.* at 890. There, the Ninth Circuit noted the existence of a premium on the sale of mobile homes as a result of the ordinance, and the absence of a mechanism that prevented the mobile home owner from capturing a premium on the sale. *Id.* at 899. This combination resulted in an unconstitutional taking because the ordinance did not substantially advance its stated purpose. *Id.*

Second, in *Chevron v. Bronster*, 363 F.3d 846 (9th Cir. 2004), the trial court held unconstitutional under the Takings Clause a rent-control law that limited the rent oil companies could collect from dealers who leased company-owned service stations. The trial court's ruling was based on evidence that the reduced rent mandated by the ordinance would not flow to consumers (as intended) but would instead allow lessees to charge a premium for their leaseholds. *Id.* at 857. The Ninth Circuit affirmed.

The uncontroverted facts in this case establish the existence of a premium. The ordinance at issue contains no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile

homes. As such, the ordinance fails to substantially advance its stated purpose. Therefore, pursuant to *Richardson*, *Cashman*, and *Bronster*, the ordinance is an unconstitutional regulatory taking, and Plaintiffs are entitled to summary judgment as to their takings claim, their fourth and fifth causes of action.[6]

IV. Substantive Due Process and Equal Protection Claims

Because the Court has held that the challenged ordinance is, on its face, unconstitutional and invalid under the Takings Clause, the Court does not consider Plaintiffs' due process and equal protection challenges.

V. Conclusion

For the reasons and in the manner set forth above, the Court on Plaintiffs' Motion for Partial Summary Judgment (docket #40) is granted. The Court grants summary judgment in favor of Plaintiffs as to their claim brought pursuant to the Tak-

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[6] A portion of Plaintiffs' fourth cause of action is based on the Equal Protection Clause. Because the Court holds that the ordinance is unconstitutional under the Takings Clause, the Court has not considered whether the ordinance violates due process or equal protection. According, the Court's grant of summary judgment does not extend to that portion of Plaintiffs' fourth cause of action that is based on an alleged denial of equal protection.

Additionally, the portions of Plaintiffs' First Amended Complaint ("FAC") that set forth the fourth and fifth causes of action contain a number of legal arguments. The Court holds that the ordinance at issue is an unconstitutional regulatory taking based on the rationale set forth above, rather than all of the legal bases advanced by Plaintiffs in the FAC. *See*, *e.g.*, FAC ¶¶ 42(c)-(e), 48.

ings Clause of the Fifth Amendment to the United States Constitution, their fourth and fifth causes of action.

Dated: October 29, 2004

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

Santa Barbara County Code § 11A-1 (2002) provides:

Sec. 11A-1. Purpose.

A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the county of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county of Santa Barbara.

Santa Barbara County Code § 11A-5 (2002) provides:

Sec. 11A-5. Increases in maximum rent schedule.

(a) Management's notice of an increase in the maximum rent schedule shall:

(1) Comply with state law; and

(2) Indicate whether or not the percentage of noticed increase in relation to the previous maximum rent schedule, less allowed costs for capital improvements and/or capital expenses, if any, is in excess of seventy-five percent of the percentage by which the most recently published edition of the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers, Los Angeles-Long Beach-Anaheim area, all items, Base Index 1967=100, shows that such index has increased during the immediately preceding twelve months for which said index has been published at the time notice of the increase was given or since the last rent increase (hereinafter called "in excess of seventy-five percent of CPI"); and

(3) Where the noticed increase is in excess of seventy-five percent of CPI, management shall:

(A) Itemize amounts for increased operating costs; any capital expenses incurred in the prior year to be undertaken for which reimbursement is sought, hereinafter "new" capital expenses; any capital expenses allowed in prior years but not fully reimbursed, hereinafter "old" capital expenses; any offset against new or old capital expenses; and capital improvements.

(B) Set a meet and confer session. The procedure for meet and confer shall be set out in the rules for hearing.

(b) Homeowners may, no later than forty-five days after the date of notice, file a petition for hearing to contest the proposed increase but only if the increase is in excess of seventy-five percent of CPI.

(c) The hearing shall be set by the clerk, held before an arbitrator, and governed by the provisions of this chapter and of the rules for hearing.

(d) The arbitrator shall deny a hearing on a noticed increase:

(1) Where management has not waived its right to object and proves by a preponderance of evidence that:

(A) The homeowners' petition for hearing was not supported by a homeowner majority or was untimely filed. For purposes of this determination, management may require the testimony of the clerk but may not require the production of homeowner's petitions or copies thereof, except that said petitions may be examined by the arbitrator; or

(b) The noticed increase is not in excess of seventy-five percent of CPI; or

(2) Where no homeowners' representatives attended the meet and confer.

(e) The arbitrator shall deny an increase in the maximum rent schedule where homeowners prove by a preponderance of evidence that:

(1) Management has previously increased the maximum rent schedule such that the effective date of the proposed increase will be less than twelve months after the effective date of the previous increase; or

(2) Management has failed to provide a meet and confer session.

(f) If the hearing and/or increase is not denied pursuant to the foregoing paragraphs, the arbitrator shall consider all relevant factors to the extent evidence thereof is introduced by either party or produced by either party on request of the arbitrator.

(1) Such relevant factors may include, but are not limited to, increases in management's ordinary and necessary maintenance and operating expenses, insurance and repairs; increases in property taxes and fees and expenses in connection with operating the park; capital improvements; capital expenses; increases in services, furnishings, living space, equipment or other amenities; and expenses incidental to the purchase of the park except that evidence as to the amounts of principal and interest on loans and depreciation shall not be considered.

(g) The arbitrator shall automatically allow a rent increase of seventy-five percent of the CPI increase (hereinafter "automatic increase").

(h) The arbitrator may allow an increase in excess of the automatic increase for increased costs where increases in expenses and expenditures of management justify such increase.

(i) To determine the amount of any increase in excess of the automatic increase, the arbitrator shall:

(1) First, grant one-half of the automatic increase to management as a just and reasonable return on investment. The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment;

(2) Next, grant one-half of the automatic increase to management to cover increased operating

costs. The arbitrator shall have no discretion to award less than this amount for operating costs;

(3) Next, add an amount to cover operating costs, if any, in excess of one-half of the automatic increase. The arbitrator shall have discretion to add such amounts as are justified by the evidence and otherwise permitted by this chapter;

(4) Next, add an amount to cover new capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increases for new capital expenses;

(5) Next, add an amount to cover old capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increase for old capital expenses unless such difference has already been used to offset an increase for a new capital expense or another old capital expense. The arbitrator shall have discretion to review operating costs and the sufficiency of any offset, but not to redetermine the right of management to reimbursement for an old capital expense.

(6) Finally, add an amount to cover increased costs for capital improvements, if any. The arbitrator shall have discretion to add such amount as is justified by the evidence and otherwise permitted by this chapter.

(j) The total increase shall not exceed the amount in management's notice of rent increase.

(k) Evidence as to costs to be incurred prior to the next rent increase may be considered only where

such evidence shows that these costs are definite and certain.

(l) Increases in the maximum rent schedule set by the arbitrator shall become effective as of the effective date in the notice or rent increase.

Santa Barbara County Code § 11A-6 (2002) provides:

Sec. 11A-6. Capital improvements and capital expenses.

(a) Capital Improvements.

(1) The cost of capital improvements incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase:

(A) After written approval of a homeowner majority without hearing; or

(B) After failure of homeowners to contest a rent increase which includes costs for capital improvements; or

(C) After approval at hearing.

(2) Any notice of a rent increase which is in excess of seventy-five percent of CPI and includes costs for capital improvements shall contain a payment plan showing the cost of the improvement per mobilehome space and the time period required to amortize the cost of the improvement, e.g., ten dollars per space for seventy-two months.

(3) Notwithstanding any other provision to the contrary, the cost of capital improvements required by a change in governmental law or regulation may be automatically passed on to homeowners at the time of an annual increase. Any hearing on such costs shall be solely for the purpose of determining whether management's plan for compliance or for recoupment of costs is unreasonable if so alleged by homeowners.

(4) Management shall deduct increases allowed for capital improvements at the time which was

specified by the arbitrator, or if no time was so specified, then at the time specified by the payment plan.

(A) If management fails to automatically deduct such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(B) If the arbitrator finds that management failed to deduct the increase, the arbitrator shall order management to credit such amount to each homeowner retroactive to the date the increase should have been deducted together with interest at the legal rate.

(5) If management fails to begin construction of a capital improvement within six months after approval of the cost of the capital improvement, then management shall discontinue the increase for the capital improvement and shall credit any amounts collected to each homeowner. If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(b) Capital Expenses.

(1) The cost of capital expenses incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase.

(2) Any notice of a rent increase which is in excess of seventy-five percent of CPI and includes costs for capital expenses shall contain a payment plan which shows the amount needed per month to amortize the cost of the capital item(s) over the useful life

of the item(s). Payment plans for old capital expenses are not subject to modification by the arbitrator unless mutually agreed to by management and homeowners.

(3) Notwithstanding any other provision to the contrary, the cost of capital improvements required by a change in governmental law or regulation may be automatically passed on to homeowners at the time of an annual increase. Any hearing on such costs shall be solely for the purpose of determining whether management's plan for compliance or for recoupment of costs is unreasonable, if so alleged by homeowners.

(4) Management shall deduct increases allowed for capital expenses at the time which was specified by the arbitrator, or if no time was so specified, than at the time specified by the payment plan.

(A) If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(B) If the arbitrator finds that management failed to discontinue the increase, the arbitrator shall order management to credit such amount to each homeowner retroactive to the date the increase should have been deducted together with interest at the legal rate.

(5) If management fails to begin construction of a capital expense item within six months after approval of the cost of the capital expense, then management shall discontinue the increase for the capital expense and shall credit any amount collected to each homeowner. If management fails to automati-

cally discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(c) Whenever costs for capital improvements and/or capital expenses are included in rent, management shall provide each homeowner at least once a year a statement showing the following:

(1) The amount of rent without charges for capital improvements and/or capital expenses;

(2) The monthly amount for each capital improvement and/or capital expense;

(3) The date by which the charge for each capital improvement and/or capital expense will be fully amortized;

(4) If this information is provided in an annual notice of rent increase, an additional statement is not required.

Santa Barbara County Code § 11A-8 (2002) provides:

Sec. 11A-8. Collection and frequency of increases.

(a) Management may increase the maximum rent increase schedule no more than once a year for tenancies not subject to a lease. Assuming proper notice, management may collect increases as of the effective date of increase specified in the notice.

(b) Where a homeowner majority has petitioned for a hearing on an increase and the hearing is to be held after the effective date of increase, management may collect the increase pending the arbitrator's decision; however, any portion of an increase in excess of seventy-five percent of the CPI increase shall be placed in an interest-bearing account in the name of management as trustee for the homeowners of that park.

(1) Where the arbitrator approves the full amount of noticed increase, management shall be entitled to retain the full amount in the interest-bearing account together with accrued interest, if any.

(2) Where the arbitrator approves an increase in an amount less than the amount noticed, management shall be entitled to the full amount in the interest-bearing account subject to a homeowner credit against future rent. The amount of the credit shall be the difference between the amount deposited in the interest-bearing account and the amount approved, plus a proportional amount of the interest, if any, prorated among the tenancies. Management shall notify each homeowner in writing of the amount of credit.

(c) Where a new maximum rent increase schedule has been set by the board of supervisors upon review or by the arbitrator upon rehearing, adjustments in rent paid shall be made in accordance with subsections (b)(1) and (2) of this section.