

No. 06-56306

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM AND
MAUREEN H. PIERCE,

Plaintiffs-Appellants,

versus

CITY OF GOLETA, *et al.*,

Defendants-Appellees.

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

**BRIEF OF AMICI CURIAE
NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTI
HOUSING COUNCIL, APARTMENT ASSOCIATION OF CALIFORNIA
SOUTHERN CITIES, INC., AND THE APARTMENT ASSOCIATION OF
ORANGE COUNTY IN SUPPORT OF PLAINTIFFS/APPELLANTS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTERESTS OF <i>AMICI CURIAE</i>	1
II. CORPORATE DISCLOSURE STATEMENT	3
III. SUMMARY OF ARGUMENT	3
IV. ARGUMENT	4
A. The Panel Correctly Decided that Goleta’s Rent Control was an Unconstitutional Taking Without Compensation	4
B. Rent Control is Bad Public Policy that Damages Communities for Years After its Enactment	7
C. The Dissent was in Error to Suggest that No Hearing on Damages is Necessary.....	11
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Armstrong v. United States</i> , 364 U.S. 40 (1960)	6
<i>Cienega Gardens v. United States</i> , 331 F.3d 1319 (Fed. Cir. 2003)	7
<i>Equity Lifestyle Properties v. County of San Luis Obispo, et al.</i> , 538 F.3d 1184 (9 th Cir. 2008)	14
<i>Guggenheim v. City of Goleta</i> , 582 F.3d 996 (9 th Cir. 2009)	6, 11, 13
<i>Leong v. Potter</i> , 347 F.3d 1117 (9 th Cir. 2003)	13
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	6, 14
<i>Penn Central Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978) ..	4, 5, 6, 13, 14
<i>Santa Maria v. PacBell</i> , 202 F. 3d 1170 (9 th Cir. 2000)	13
Other Authorities	
U.S. Department of HUD, “Report to Congress on Rent Control”, September 1991, at p. vii	8
District of Columbia Financial Responsibility and Management Assistance Authority’s Report #99-C-010, “The Likely Impacts of Rent De-Control on District of Columbia Residence,” July 10, 2000	9
Downs, <u>A Reevaluation of Residential Rent Controls</u> , 1996	8
Early and Phelps, “Rent Regulations’ Pricing Effect in the Uncontrolled Sector: An Empirical Investigation,” <u>Journal of Housing Research</u> , Vol. 10, Iss. 2, 1999, 267	9
Fannie Mae Foundation’s <i>Journal of Housing Research</i>	9
Goetze, “Rent Control: Affordable Housing for the Privileged, Not the Poor,” CATO Institute, 1994	10
Krugman, “A Rent Affair,” <u>N.Y. Times</u> , June 7, 2000	8
Not in My Back Yard: Removing Barriers to Affordable Housing,” Report by the Advisory Commission on Regulatory Barriers to Affordable Housing	8
Smith, “Web Update 6: Rent Control’s Pricing Effect and Its Long-Term Cost to Communities,” Mar. 29, 2000	9

Southern California Multifamily 2010 Report published by the University of Southern California Lusk Center, Casden Real Estate Economics Forecast	12
St. John and Associates, “Rent Control in Perspective – Impacts on Citizens and Housing in Berkeley and Santa Monica Twelve Years Later,” Pacific Legal Foundation, 1993	10

I. INTERESTS OF *AMICI CURIAE*

The National Apartment Association (“NAA”), is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 50,000 members responsible for more than 5.9 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing.

Based in Washington, DC, the National Multi Housing Council (“NMHC”) is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

Southern Cities began eight decades ago in Long Beach, California as a group of apartment owners united to improve the rental housing market. More than 69,000 apartment and rental property owners do business in the 54 cities of Southern Los Angeles County, which is the area represented by Southern Cities. The association supports the private property rights of its members and advocates

for fair governmental treatment for multi-family residential businesses with respect to taxation, fees, land use, zoning and other issues affecting the real estate industry. Southern Cities is a state affiliate of the National Apartment Association.

The Apartment Association of Orange County (“AAOC”) is a nonprofit (501c(6)) California corporation. The Association has approximately 3,000 members, consisting primarily of private individuals who own residential rental property. The Association members also include property managers and suppliers. AAOC advances the economic, social, and educational interests of its members. Issues presented in the present matter may impact the ability of residential rental property owners and managers to contract freely with potential tenants, and to protect their property. AAOC has a strong interest in protecting the constitutional rights of its members, and in seeking to avoid dilution of those constitutional rights. AAOC is a local affiliated association of the National Apartment Association.

As providers of rental housing, *amici* members face rent control regulations that substantially affect their ability to deliver affordable housing for residents while generating return for their investors. Rent control reduces apartment owners’ income needed for the maintenance of existing assets while preventing the new construction of apartment homes and rental units.

II. CORPORATE DISCLOSURE STATEMENT

The National Apartment Association, National Multi Housing Council, Apartment Association of California Southern Cities, and the Apartment Association of Orange County have no parent corporations and no publicly traded corporations have any ownership interest in these not-for-profit trade associations.

III. SUMMARY OF ARGUMENT

The continued fascination of certain California cities with rent control has produced a growing body of legal precedent in this Circuit, only the latest of which is the rent control regime adopted by the City of Goleta. Whether aimed at mobile homes or other rental housing, rent control ordinances have led to repeated challenges under the Takings Clause of the Fifth Amendment. For the most part, courts have deferred to the legislative judgment that these laws enhance legitimate public interests. This recurring area of contention has been caused by the proclivity of the cities to impose regulatory takings without compensation.

It is significant that the appellate panel's decision that is now under review was unanimous in its conclusion that Goleta's rent control was an unconstitutional taking without compensation. Although we agree with both the analysis and conclusions reached in the decision, as *amici curiae*, we submit this brief to address what we believe to be the overly restrictive view expressed in the dissenting opinion that there is no need for a remand to the district court for a

damage calculation. We submit that the damages generated by rent control are not necessarily discernible when the ordinance is passed. Subsequent events or statutory revisions may be relevant to the ad hoc analysis required by *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The property owners in this case should not be deprived of an opportunity to prove their damages nor should the City of Goleta be deprived of its opportunity to disprove those damage claims.

IV. ARGUMENT

A. The Panel Correctly Decided that Goleta's Rent Control was an Unconstitutional Taking Without Compensation

The appellees unanimously criticize the panel decision for its failure to follow the principles of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). That seminal case and the later decisions that interpreted it did not lay down a formula for how governments might take private property without compensation. Instead, on the record before it, the Court articulated the principles to be considered in future cases while concluding that the City of New York was justified in denying a permit for a particular use of the air rights over a historic building.

In *Penn Central*, the owners of Grand Central Station had failed to challenge that structure's historic designation administratively nor did they seek approval of alternative development plans for their construction plans from New York's Planning Commission. Moreover, the Court explicitly noted the possibility that

other (smaller) development schemes might be approved by the Commission. The conclusion of the opinion limited Penn Central’s “present ability to use the Terminal for its intended purposes”¹ but did not rule out other applications for more limited development. *Id.* at 138.

By contrast, the property owners in Goleta filed suit within a month of their failed efforts to persuade City officials that they had acted illegally. Moreover, the district court’s decision to stay the lawsuit for the resolution of state law claims in the Santa Barbara Superior Court resulted in a far more developed record when it reappeared on its docket. That record was amplified by the parties’ submissions on summary judgment in the district court. Finally, the City of Goleta made certain tactical decisions² that contributed to the record before the panel.

The panel correctly analyzed the three factors identified in *Penn Central*: (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 government action.

¹ The foundation of the terminal was structured so that it would support a 20-story tower. *Id.* n.15. Penn Central’s proposal was to build such a structure over the existing terminal.

² Failure to raise standing; stipulation that there was a gap in time when no rent control was in effect; the ambiguity of its position on a facial taking; and failure to object to the use of Appellants’ expert report on damages.

Both the district court and the panel credited the Quigley report³ that housing costs in Goleta increased 205% from 1997-2003 and an additional 21.1% in 2004 and that the controlled rent did not keep pace. *Guggenheim v. City of Goleta*, 582 F.3d 996, 1020 (9th Cir. 2009). This resulted in a transfer of wealth of \$100,000 per site. This finding “weighs heavily in the Park Owner’s favor.” *Id.* at 1023.

The second factor is the extent to which the regulation has interfered with distinct investment backed expectations. The City argues that the ability to earn some (*albeit* decreased) rate of return was reasonable because the owner’s expectations were necessarily influenced by the existence of rent control. Yet this argument is but one of the three *Penn Central* factors. An owner’s expectations may be influenced over time by the enactment, modification, or rescission of a regulatory climate. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

The fundamental question here is whether the rent control ordinance requires the owners to unfairly bear the economic burden that should be shared by all taxpayers. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The district court found that Goleta forced the owners to rent at an 80% discount below market rate. Even the city’s expert concluded that this resulted in a windfall for current and former residents. *Guggenheim v City of Goleta* at 1020.

³ Doctor John M. Quigley a professor of economics, business and policy at the University of California Berkeley.

This approach was adopted by the Federal Circuit in *Cienega Gardens v. United States*, 331 F.3d 1319, 1348 (Fed. Cir. 2003) and quoted with approval by the panel. It condemned an attempt to shift the burden of providing low income housing from the taxpayers to participants in a loan program. That shift resulted in a 96% decrease in property value.

B. Rent Control is Bad Public Policy that Damages Communities for Years After its Enactment

Rent control proponents usually justify the need for this legislation as necessary for the preservation of affordable housing stock or as a means to correct inequities in the market system. The underlying assumption is that renters are at a relative economic disadvantage as compared to property owners.⁴

Notwithstanding its political popularity in California (for rental housing and mobile homes), rent control legislation has not been widely enacted in other jurisdictions in the Ninth Circuit or nationally.⁵ The vast majority of state legislatures have not enacted rent control.

Rent control is poor affordable housing policy; its harms are numerous and well-established. As Paul Krugman pointed out in a *New York Times* editorial,

⁴ “... [T]he homeowners are held hostage to an unregulated landlord’s whim....” Brief of *Amicus Curiae Golden State Manufactured Home Owners League*, at p. 4.

⁵ Forty-six states have no rent control. Notable exceptions to this trend would be New York City and the District of Columbia.

“[t]he analysis of rent control is among the best-understood issues in all of economics, and – among economists, anyway – one of the least controversial.”⁶

1. “[M]ost of the benefits produced by rent controls aid moderate-, middle-, and upper-income households, rather than the poor households they may have been adopted to help.” That is the conclusion of perhaps the pre-eminent scholar on rent control, Anthony Downs of the Brookings Institution, in his definitive academic research work, *A Reevaluation of Residential Rent Controls*.⁷ The Department of Housing and Urban Development concurs: “the benefits of rent control are poorly targeted ... Significant numbers of well-to-do renters live in rent-controlled apartments and enjoy substantial benefits, while many lower-income renters receive little or no benefit.”⁸ As a means of redistributing income to the poor ... rent control is extraordinarily inefficient, if not counterproductive,” wrote the Advisory Commission on Regulatory Barriers to Affordable Housing, a blue-ribbon panel of experts.⁹

In the District of Columbia, the Housing Authority’s study confirmed that rent control primarily benefits moderate- and upper-income residents. Some

⁶ Krugman, “A Rent Affair,” N.Y. Times, June 7, 2000. A 1992 poll of the American economic Association revealed that 93 percent of its members agree that “a ceiling on rents reduces the quantity and quality of housing.”

⁷ Downs, A Reevaluation of Residential Rent Controls, 1996, at p. 5.

⁸ U.S. Department of HUD, “Report to Congress on Rent Control”, September 1991, at p. vii.

⁹ “Not in My Back Yard: Removing Barriers to Affordable Housing,” Report by the Advisory Commission on Regulatory Barriers to Affordable Housing, 3-5.

61,100 of 101,463 units under rent control had household income of \$25,000 or more per year. Remarkably, 5,202 units under rent control had household income of \$50,000 or more per year.¹⁰

2. Rent control drives up rents paid by renters, many of them low-income, who live in uncontrolled apartments. That is, rent control works as a tax on low-income families in uncontrolled apartments for the benefit of upper- and moderate-income renters, among others, in rent-controlled housing. A 1999 article in the Fannie Mae Foundation's *Journal of Housing Research* demonstrated that uncontrolled apartments in cities with rent control have rents that are 13-15% higher – that is, \$85 per apartment per month in 1996 dollars, or about \$100 per month in today's dollars – than they would have been if rent control were absent.¹¹ This amounts to a “huge, disguised tax” of \$1,200 a year on uncontrolled renters who, as researcher David Smith noted, “may be demographically no different from the beneficiaries, just unluckier.”¹²

3. Rent control inhibits new construction. By forcing rents below the market price, rent control directs investment capital out of the rental market and

¹⁰ District of Columbia Financial Responsibility and Management Assistance Authority's Report #99-C-010, “The Likely Impacts of Rent De-Control on District of Columbia Residence,” July 10, 2000, Table 3-7, 61.

¹¹ Early and Phelps, “Rent Regulations’ Pricing Effect in the Uncontrolled Sector: An Empirical Investigation,” *Journal of Housing Research*, Vol. 10, Iss. 2, 1999, 267, <http://www.fanniemae foundation.org/research/journal/jhr1002/early.pdf>.

¹² Smith, “Web Update 6: Rent Control’s Pricing Effect and Its Long-Term Cost to Communities,” Mar. 29, 2000. www.recapadvisors.com.

into other markets with greater returns. Studies have shown, for example, that the total number of rental units in Cambridge and Brookline, Massachusetts, fell by 8 percent and 12 percent respectively during the 1980s, following the imposition of stringent rent controls. Rental inventories in most nearby communities rose during that period.¹³ Similarly, in California, the total supply of rental units dropped 14 percent in Berkeley and 8 percent in Santa Monica between 1976 and 1990, even though the rental supply rose in most nearby cities.¹⁴

4. Rent control also increases gentrification, “Advantaged, gentrified households replaced many lower-income, elderly, minority, and family households in rent-controlled apartments,” a study of rent control in Cambridge (MA) revealed.¹⁵ “The effect of lower rents in rent-controlled apartments is that more and more affluent tenants came to rent them ... creating a group of privileged new tenants who might otherwise have chose to live in condominiums in the city as property taxpayers.” Faced with these realities, Massachusetts citizens voted to eliminate rent control statewide in 1994.

¹³ Goetze, “Rent Control: Affordable Housing for the Privileged, Not the Poor,” CATO Institute, 1994.

¹⁴ St. John and Associates, “Rent Control in Perspective – Impacts on Citizens and Housing in Berkeley and Santa Monica Twelve Years Later,” Pacific Legal Foundation, 1993.

¹⁵ Goetze, “Rent Control: Affordable Housing for the Privileged, not the Poor,” CATO Institute, 1994, at p. i.

The preceding discussion of the economic disadvantages of rent control was not submitted as an invitation for this Court to substitute its judgment for that of any legislative body on what remains to be a political issue. Rather, it was designed to illustrate that economic injuries may befall an owner at various times throughout a rent control regime. The *Guggenheim* panel recognized this fact. *Guggenheim v. City of Goleta*, at 1026-1027.

The dissent to the panel opinion suggests that any injury accruing from an unconstitutional taking might be apparent at the time of the legislation's enactment. We respectfully suggest that this view fails to account for independent injuries, caused by the taking, but not actionable until a future date.

C. The Dissent was in Error to Suggest that No Hearing on Damages is Necessary

While agreeing with the panel's majority conclusion that the city's rent control does amount to a regulatory taking, Judge Kleinfeld concluded that the Guggenheims had suffered no economic impact as a result of the reenactment of rent control. In remanding, the majority advised the district court to consider "detailed figures" in addition to other evidence it deems relevant in conducting its analysis to ascertain the precise amount of just compensation owed the park owners. *Guggenheim v. City of Goleta*, at 1034-35.

It would be facile to suggest that the economic impact of rent control could be determined solely at the time of its statutory enactment. Subsequent statutory

modifications or extensions will occur at times of radically different economic conditions. In recent years, the United States has experienced an overabundance of easily financed housing stock where it was actually easier for persons to buy homes rather than rent. The wave of foreclosures that followed disrupted both the owner occupied and rental housing markets. The loss of jobs and subsequent high unemployment rates predictably resulted in rental vacancies where unemployed persons move back to live with their families.

This was illustrated by the recently released Southern California Multifamily 2010 Report.¹⁶ A portion of the report chronicled the impact of the loss of 222,000 jobs in the Los Angeles market where certain jurisdictions have adopted rent control and the subsequent 12.6% unemployment rate. As a consequence, rents declined 12.9% in 2009. *Id.* at 15-16.

The impact of a rent control ordinance in a housing market with strong demand and high occupancy levels presents challenges to owners and operators of rental housing. When rent control exists in a market with falling rent prices and occupancy levels, the costs associated with rent control are magnified. Similarly, current difficulties in obtaining financing have caused many owners to default on mortgage obligations resulting in an unprecedented number of receiverships. Since one of the *Penn Central*'s three areas of analysis is the interference with

¹⁶ Southern California Multifamily 2010 Report published by the University of Southern California Lusk Center, Casden Real Estate Economics Forecast.

investment-backed expectations, it makes perfect sense to remand for determination of what those expectations are in the light of market conditions. This was never done by Goleta because it “failed” to review the County Code or make any findings on whether there was a purpose or need for the RCO (rent control ordinance) in the current real estate market. *Guggenheim v. City of Goleta*, at 1002. Reasonable investments backed expectations will vary tremendously in response to market movement.

After its initial passage, a rent control statute might be extended or modified by legislative action. The record below is undisputed that although the rent control ordinance was initially passed in 1976, there was a time period in 2002 when there was no rent control in effect for the Guggenheim’s mobile homes. We submit that such extension or modification would restart the application of the statute of limitations so that the trial court might examine the existence of the reasonableness of investment backed expectations at that time. *Santa Maria v. PacBell*, 202 F. 3d 1170, 1178 (9th Cir. 2000), *Leong v. Potter*, 347 F.3d 1117, 1123 (9th Cir. 2003).

The market turmoil described above, will necessarily influence changes in ownership in addition to the everyday business reorganizations and passages of title through inheritance. This Court has held that subsequent owners do not have standing to challenge statutes that they claim constitute takings so that the injury may only be asserted by the original owner at the time of enactment. *Equity*

Lifestyle Properties v. County of San Luis Obispo, et al., 538 F.3d 1184, 1190 n.11, 1193 n.15 (9th Cir. 2008). Yet this view was explicitly rejected in *Palazzolo v. Rhode Island* 533 U.S. at 630. The view that a subsequent owner could bring a challenge was noted by a number of the justices despite their disagreements on many other aspects of the case.

We suggest that a remand for damage calculation is appropriate as part of the ad hoc analysis mandated by *Penn Central* and that the notion of a reasonable return on investment must reflect market realities.

V. CONCLUSION

Amici respectfully urge the Court to uphold the panel decision and remand this case to the district court for a determination of damages.

Dated: April 16, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(b), the Brief of Amicus Curiae is produced using at least 14-point Times New Roman type including footnotes and contains approximately 3,388 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 16, 2010

/s/John J. McDermott

John J. McDermott

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 16TH day of April, 2010, a true and correct copy of the above and foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF electronic filing system. Participants in the case who are registered with CM/ECF shall be served by the CM/ECF system.

/s/ John J. McDermott
JOHN J. MCDERMOTT