No. 06-56306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY OF GOLETA, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Case No. CV 02-02478FMC (Rzx)
Honorable Florence-Marie Cooper, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND MANUFACTURED HOUSING INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS DANIEL GUGGENHEIM, ET AL., ON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pacific Legal Foundation has no parent corporation, and no publicly traded company owns 10% or more of its stock. The Manufactured Housing Institute has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Pacific Legal Foundation and the Manufactured Housing Institute respectfully submit this brief amicus curiae in support of Plaintiffs-Appellants Daniel Guggenheim, et al. (the Guggenheims), on rehearing *en banc*.

INTEREST OF AMICI

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. Representing the views of tens of thousands of members and supporters, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property.

PLF attorneys have litigated many leading cases around the nation arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. PLF attorneys were counsel of record before the Supreme Court in, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)*; Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). PLF attorneys also were counsel of record before this Court in *Cashman v. City of Coati*, 374 F.3d 887 (9th Cir. 2004), *op. withdrawn on rehearing*, 415 F.3d 1027 (9th Cir. 2005), a facial challenge to a mobile home park rent control ordinance under the Takings Clause of the Fifth Amendment.

The Manufactured Housing Institute (MHI) is located outside of Washington, D.C., and is the national trade association representing all segments of the manufactured housing industry including manufacturers, lenders, community owners, and retailers.

PLF and MHI seek to provide this Court with an additional viewpoint on two important issues in this case. First, the regulatory takings doctrine of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), requires courts to weigh and balance each of three different factors in determining whether takings liability has accrued. It is a fundamental doctrinal error to rule that a takings claim cannot succeed if the government prevails on only *one* of these three criteria, as the City of Goleta and its amici urge this Court, and as Judge Kleinfeld argued in his dissent from the panel opinion. Second, PLF and MHI seek to impress upon this Court that the "character of the government action" embodied in the City of Goleta's rent control ordinance (RCO) is a naked wealth transfer, serving solely to enrich the incumbent tenants of the Guggenheims' mobile home park at the Guggenheims' expense, with no net social benefits. As amici will show, this effect has been demonstrated by over two decades of legal and economic scholarship. Portraying the RCO as a means of preserving affordable housing or "protecting coach owners' investments" is simply a diversion, by which the City and its amici hope to distract the Court's attention from the actual, well documented character of regulations of this type.

ARGUMENT

I

PENN CENTRAL SETS OUT A BALANCING TEST IN WHICH ALL THREE IDENTIFIED FACTORS MUST BE WEIGHED TO DETERMINE WHETHER LIABILITY FOR A TAKING HAS BEEN INCURRED

All parties agree that the Guggenheims' regulatory takings claim is governed by the framework set out by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104. Under that decision, takings liability turns on an "essentially ad-hoc, factual inquiry":

> The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. at 124 (citation omitted). Nothing in this formulation suggests that the Court meant to bar facial takings challenges under *Penn Central*. What is clear, however—as has been confirmed by subsequent opinions and by the analysis of virtually all commentators—is that reviewing courts must evaluate and weigh all three of the factors identified above to determine whether, on balance, a violation of the Fifth Amendment has occurred. *See, e.g.*, J. David Breemer and R. S. Radford, *The (Less) Murky Doctrine of Investment-Backed Expectations After Palazzolo and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351, 398-99 (2005) ("[t]o comport with *Palazzolo*, courts must consider and

balance *all* the relevant partial takings factors before determining whether a taking has occurred, regardless of the outcome of the investment-backed expectations criterion"); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 Va. Envtl. L.J. 43, 66-67 (2004) ("The investment-backed expectations factor must be weighed and balanced against the other two factors . . . . For that reason, a landowner need not necessarily prove that the regulation frustrated distinct investment-backed expectations in order to prevail on her partial takings claim.").

In his dissent from the panel opinion in this case, Judge Kleinfeld mistakenly collapsed *Penn Central*'s three-factor balancing test into a single criterion: "The Guggenheims cannot demonstrate any investment backed expectations that were harmed by the 2002 reenactment of the ordinance." *Guggenheim v. City of Goleta*, 582 F.3d 996, 1037 (9th Cir. 2009) (Kleinfeld, J., dissenting). It has been demonstrated that Judge Kleinfeld's substantive analysis of this point was erroneous. *See, e.g.*, Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 Haw. L. Rev. 533, 565-67 (2002) (noting the circularity of the argument that the state may unilaterally extinguish property rights if subsequent buyers are deemed to have no reasonable expectation that those rights can be enforced in court). It is more important, however, for this Court to recognize that *Penn Central* does not permit the resolution of takings claims by reference to any single factor, standing alone.

Judge Kleinfeld's error is especially remarkable because it was specifically addressed and clarified by the Supreme Court in *Palazzolo*. Justice Kennedy's majority opinion underscored the problem and reversed a state court decision that rested precisely on the thesis of Judge Kleinfeld's dissent:

> 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 or took title with notice of the limitation.

Palazzolo, 533 U.S. at 613. Even Justice O'Connor's concurrence in *Palazzolo*, which would allow notice of preexisting regulations to be considered in determining an owner's investment-backed expectations, cannot be employed, as Judge Kleinfeld does, to completely bar takings claims without consideration of the remaining *Penn Central* factors:

> If 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 636 (O'Connor, J., concurring).

The panel opinion in this case was notable for its analytical consistency in examining and weighing each of the three *Penn Central* factors to determine, on balance, whether liability for a taking had been incurred. The record showed that the economic impact of the RCO on the Guggenheims' property was significant, transferring as much as $100,000 per homesite from the value of the mobile home

park to the Guggenheims' tenants. *See* panel decision, *Guggenheim*, 582 F.3d at 1023. The character of the government action was a "naked transfer accomplished by the mere enactment of the RCO," *id.* at 1021, which, according to expert testimony credited by the trial court, would actually lead to higher housing costs than would exist in the absence of regulation, and inhibit the supply of affordable housing in the community. *Id.* at 1019-20. Finally, although the Guggenheims' investment-backed expectations of owning unregulated property were weak because of the existence of rent control when they acquired title, this factor alone could not, consistent with the Supreme Court's holding in *Palazzolo*, outweigh the strong showing of takings liability under the remaining two prongs of *Penn Central*. *Id.* at 1023-27.

Given the rarity with which *Penn Central* is correctly and conscientiously applied, it would be a grave disservice for this Court to return to the discredited practice of resolving takings claims in favor of the government based on the analysis of a single element that should be factored into *Penn Central*'s three-pronged balancing test.

II

THE "CHARACTER OF THE GOVERNMENT ACTION" IN THIS CASE IS A NAKED WEALTH TRANSFER, ENRICHING INCUMBENT PARK TENANTS WHILE GENERATING NO NET SOCIAL BENEFITS

Exactly what considerations the *Penn Central* Court intended to include under the "character" prong of its analysis has never been completely clear. The *Penn Central* majority itself could think of only one example for guidance:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124 (citation omitted). Yet, only four years after those words were penned, the Court carved out physical invasions as categorical takings not subject to *Penn Central*'s balancing calculus at all. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). What remains—the Court's reference to adjusting benefits and burdens to promote the common good—has been interpreted by scholars across the legal spectrum as a fairness criterion.

Professor Eagle has observed the importance of this factor in evaluating the "worthiness of the government's regulatory purpose," which he posits as the core function of the character inquiry. Steven J. Eagle, *"Character" as "Worthiness": A New Meaning for* Penn Central's *Third Test?*, 27 Zoning & Planning L. Rep. 6:1, 1 (2004); *see also* Steven J. Eagle, *"Character of the Governmental Action" in Takings*

Law: Past, Present, and Future, ALI-ABA Continuing Legal Education: Inverse Condemnation and Related Government Liability, SJ052 ALI-ABA 459, 470-71 (Apr. 22-24, 2004) (arguing that, "since the present 'character' test adds little to the Supreme Court's takings jurisprudence," it should be understood as relating to the essential fairness of the regulatory regime). Similarly, John Echeverria has noted the Court's concern over regulations that single out one or a few property owners to unfairly bear a regulatory burden that is grossly disproportional to any offsetting benefits, suggesting that

> reciprocity of advantage might usefully be deployed to give some content to the "character" factor. When a regulation necessarily creates a significant degree of reciprocity of advantage, the character factor arguably points toward rejection of the taking claim.

John D. Echeverria, *The Once and Future* Penn Central *Test*, 54 Land Use L. & Zoning Digest 6:19, 21 (2002). *See also* John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, ALI-ABA Continuing Legal Education: Wetlands Law and Regulation, SK081 ALI-ABA 143, 159-60 (June 9-10, 2005) (suggesting that the "character" inquiry should focus on whether a challenged regulation targets a few owners or is more general in application).

In the present case, as both the panel opinion and the dissent recognized, the nature of the City's RCO is a straightforward political wealth transfer from a relatively powerless minority (in this case, the Guggenheims) to a politically dominant interest

group (mobile home park tenants). *See Guggenheim*, 582 F.3d at 1003 ("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."); *id.* at 1037 (Kleinfeld, J., dissenting) (describing effect of RCO as a "naked wealth transfer"). Judge Bybee's opinion details the mechanism by which this transfer is effected as part of his analysis of the RCO's economic impact. *See id.* at 1019-24. It would be more correct, however, to recognize that the RCO's one-time wealth transfer to incumbent tenants is the very essence of the ordinance. More than simply a measure of its economic impact, this seizure and transfer of value from the Guggenheims to their tenants is the *character* of the rent control scheme, in the taxonomy of *Penn Central*.

The function of ordinances like Goleta's RCO was first identified by Dr. Werner Hirsch, an internationally acclaimed economist at the University of California at Los Angeles. *See* 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 (1988). As Dr. Hirsch explained, tenants of mobile home parks normally own their own coaches, which sit on pads owned by the park. Tenants' housing costs are therefore the sum of mortgage payments on their coach, plus rent payments on the underlying land. Rent control obviously reduces the second component but, more importantly, the expectation of below-market rents in the future

is capitalized into the resale value of the coach. This premium, or incremental resale value attributable to rent control, represents the present value of the future stream of financial benefits tenants will receive from the regulations, discounted at an appropriate rate. It is an amount equal to the decrease in value of the underlying land because of rent control, and therefore is the equivalent of a direct, forced cash transfer from park owner to tenant, effected via the legislative process. *See id.* at 423-24. Since California's Mobilehome Residency Law, Cal. Gov't Code §§ 798, *et seq.*, virtually eliminates the ability of park owners to disapprove potential buyers of coaches in their parks, owners like the Guggenheims are relegated to the role of passive observers, while their tenants appropriate and sell the cash value of living in their parks under rent control. *Id.* at 420-22.

It is important to note that the capitalization of the future value of rent control into the resale price of tenants' coaches is not a mere academic theory promoted in student-edited law reviews. Dr. Hirsch conducted empirical research to identify and measure the size of the wealth transfers that were captured and banked by tenants who successfully lobbied for the enactment of RCOs like Goleta's. In an article published in the peer-reviewed *Journal of Urban Economics* in 1988, Dr. Hirsch employed a nonlinear multiple regression model in which the in-site selling price of California mobile homes was taken as a function of eight independent variables measuring the physical quality of the mobile home coach; the size of the coach; median apartment

rents and vacancy rates in the community; the quality of the mobile home park in which the coach was situated; and whether the park was subject to rent control. Werner Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212 (1988). Hirsch's data base consisted of 333 sales of mobile homes in 40 California communities in 1984-86. Twelve of these cities had enacted rent control; the remaining 28 had not. This study found that coach resale prices were significantly higher in communities that had adopted rent control. Dr. Hirsch concluded: "It appears that capitalization of restrictions on rent increases into sales prices is substantial." *Id.* at 223-24. Specifically, "sales prices were on average about $8,800 or 32% higher in communities that had imposed rent control. *Id.* at 224.

In 1993, Dr. Hirsch conducted another study of sales in a single upper-end California park, the Laguna Vista Mobile Home Park in Oceanside, California. *See* Werner Z. Hirsch and Anthony M. Rufolo, *The Regulation of Immobile Housing Assets under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383 (1999). In this study Hirsch applied a hedonic regression model to 60 sales that occurred in the park over a six-year period in which slightly more than 60% of the park's pads were subject to rent control, while the remainder were exempt. Over this period, Hirsch found that "sales prices of mobile homes under rent control were $3,531, or 8%, higher than prices for the uncontrolled ones." *Id.* at 396.

A major new study of this topic was conducted in 2004 at the University of Southern California, where a team of urban economists examined a 20-year time series of mobile home resale prices from seven California counties. *See* David Dale-Johnson, Yongheng Deng, Peter Gordon, and Diehang Zheng, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, Working Paper No. 2004-1010, Lusk Center for Real Estate, University of Southern California (Nov. 1, 2004). Consistent with the previous literature, this research found that resale price increases for coaches in rent-controlled parks outpaced comparable units in uncontrolled jurisdictions by 17 percentage points, a difference the researchers attributed to capitalization of the value of rent control. *See id.* at 15.

In 2006, Drs. Carl Mason and John Quigley, of the University of California, Berkeley, published a detailed case study of the effect of rent control in three mobile home parks in different parts of California. *See* Carl Mason and John Quigley, *The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California* (U. C. Berkeley Program on Housing and Urban Policy, June 1, 2006) (subsequently published at 16 J. Housing Econ. 189 (2007)). Mason and Quigley applied a multiple regression model to a total of 245 sales of rent-controlled mobile homes in Marin, Santa Barbara, and San Diego Counties, finding that "virtually all" of the economic benefit of reduced rents was captured by incumbent tenants upon sale of their coaches. *Id.* at 35. Noting that the initial tenants' capitalization and capture

of the expected future value of rent control "makes it *logically impossible* for these regulations to increase 'affordability of housing' at the time of enactment [or at any time] in the future," *id.* at 6 (emphasis added), the authors also concluded that "the regulations have an inhibiting effect upon the supply of housing suitable for moderate income households in the region." *Id.* at 29.

Most recently, the researchers who conducted the 2004 University of Southern California study refined and submitted their findings for publication in a peer-reviewed academic journal. *See* Diehang Zheng, Yongheng Deng, Peter Gordon, and David Dale-Johnson, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, 16 J. Housing Econ. 209 (2007). Building on their earlier research, Zheng and her colleagues tested for the effects of mobile home RCOs in seven California counties, using sales data over a span of two decades. The authors found that under regulations like Goleta's, which continue to control rents when a mobile home becomes vacant, incumbent tenants charge a selling price for their coach that includes "the net present value of the expected savings associated with the constrained future pad rent." *Id.* at 235.

These academic investigations of mobile home rent control have shown remarkable uniformity over two decades. Not a single published economic study has contested the essential observation that regulations like Goleta's RCO function simply as political wealth transfers, shifting resources from a small group of property owners

to the political faction responsible for the measures' adoption. This transfer can only be described as the character of such ordinances, for purposes of the *Penn Central* analysis.

CONCLUSION

The panel decision in this case marked the third time a mobile home rent control scheme has been struck down by a panel of this Court under the Takings Clause of the Fifth Amendment. *See Hall v. Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987); *Cashman v. City of Coati*. The Supreme Court subsequently clarified that the proper doctrinal lens to apply to these regulations is not that of permanent physical invasions (*see Yee v. City of Escondido*, 503 U.S. 519 (1992)), or failure to substantially advance legitimate state interests (*see Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005)). What has remained constant, while the courts have shifted from one takings doctrine to another, is that rent control ordinances like the one at issue in this case are the most efficient mechanism yet devised for using the law to seize resources from a few individuals, and transfer them to a politically dominant faction. *See* William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi-Kent L. Rev. 865-912 (1991). It is a quintessential example of the process Madison warned against as the employment of governmental power for the benefit of factions. *See The Federalist* No. 10, at 778 (James Madison) (Clinton Rossiter ed., 1961). As paraphrased by Prof. McGinnis:

> The first danger in any democracy is the most readily understood. Majorities use their power to take away resources and opportunities from minorities and redistribute it to themselves.

John O. McGinnis, *The Original Constitution and its Decline: A Public Choice Perspective*, 21 Harv. J.L. & Pub. Pol'y 195, 197 (1997).

In cases like this it is not acceptable for courts to defer to the wisdom of the legislature, for the legislative process itself has been turned into the instrument by which the dominant faction enriches itself at the expense of a few individuals. If *Penn Central* is to be taken seriously as a means of protecting constitutional rights,

it should serve that function here by striking down Goleta's RCO as an unconstitutional taking.

DATED: April 16, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Civil Procedure 32(a)(7) and Ninth Circuit Rule 29-2, this Brief Amicus Curiae is proportionally spaced, has a typeface of 14 points or greater, and contains 3,481 words.

DATED: April 16, 2010.

/s/ R. S. RADFORD
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND MANUFACTURED HOUSING INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS DANIEL GUGGGENHEIM, ET AL., ON REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2010.

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

/s/ DONNA M. GREENE
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