No. 06-56306
C.D. Cal. No. CV 02-02748 FMC (RZx)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM, et al.,

Plaintiffs-Appellants,

v.

CITY OF GOLETA,

Defendant-Appellee

BRIEF FOR AMICUS CURIAE WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTEREST OF AMICUS CURIAE

Originally formed in 1945, *amicus curiae* Western Manufactured Housing Communities Association ("WMA") is the largest trade organization representing mobilehome park owners in California and the nation. Its members collectively own, operate, and control over 1,800 parks throughout the State, with approximately 180,000 resident spaces. WMA's activities include educational programs and legislative and judicial advocacy, including *amicus curiae* appearances in such leading cases as *Castaneda v. Olsher*, 41 Cal. 4th 1205 (2007), *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830 (2001), *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001), and *Andrews v. Mobile Aire Estates*, 125 Cal. App. 4th 578 (2005).

WMA's members are interested in this case because it concerns an important issue that profoundly affects their industry: the extent to which the Fifth Amendment Takings Clause protects owners of mobilehome parks against confiscatory rent and vacancy control regulation.

Submitted herewith is a motion for leave to file this proposed brief under Rule 29(b) of the Federal Rules of Appellate Procedure.

INTRODUCTION

This brief will not reargue the substantive merits of the plaintiffs' regulatory takings claim addressed by the three-judge panel. *See* Slip Opinion

filed September 28, 2009 ("Slip. Op.") at 13834-67 (majority opinion); *id.* at 13875-82 (Kleinfeld, J., dissenting). Instead, WMA addresses an equally important matter: landowners' *threshold* ability to assert a facial takings challenge to a regulation already in effect when they acquire their property. The present state of this Circuit's law concerning their standing to assert such a claim and the date that the statute of limitations begins to run, calls out for serious re-examination.

Under *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994) ("*Carson Harbor*"), a new owner could never establish Article III standing to bring a facial takings claim to such a law. This Court has already questioned the continued validity of *Carson Harbor* in light of the Supreme Court's intervening decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *See Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 n.15 (9th Cir. 2008) ("*Equity Lifestyle Properties*"). The original three-judge panel in this case did too. *See* Slip Op. at 13821 But although the standing rule of *Carson Harbor* has come under fire, the Court has not pronounced it officially dead. It is high time to eliminate any doubt. This *en banc* panel should overrule it.

In addition, dictum in *Equity Lifestyle Properties* states that a facial takings claim by a new owner, even if viable, would accrue upon the law's adoption. *See id.* at 1193 n.15. As a practical matter, that principle would foreclose a facial takings challenge to mobilehome rent and vacancy control regulation by

anyone in California who buys a mobilehome park (now) more than two years after a regulation's adoption. *See Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 n.2 and accompanying text (9th Cir. 2003) (citing Cal. Code Civ. Proc. §335.1) That, too, is inconsistent with the entire thrust of *Palazzolo*.

The Goleta City ordinance in question here was passed after the plaintiffs purchased the Ranch Mobile Estates mobilehome park, following a brief "gap" in time in which there was no rent control in place. *See* Slip. Op. at 13815 n.2. So neither the district court nor the original three-judge panel of this Court directly confronted these issues. *See* Slip. Op. at 1309, 13815 n.2, 13822. In short, the somewhat idiosyncratic facts of this case rendered such questions irrelevant.[1] Our point below is that, regardless, it would not matter. The plaintiffs' facial takings claim would be cognizable under Article III in any event. It also would be timely.

[1]Other amici assert, however, that the distinction is irrelevant in the unique circumstances of this case and that therefore the plaintiffs do lack standing to assert a facial takings challenge. *See* Brief of Amici Curiae League of California Cities et al. In Support of Petition For Rehearing And Rehearing En Banc at 10-14.

ARGUMENT

A. The Dilemma For New Property Owners Posed By The Present State of This Circuit's Regulatory Takings Law.

The Takings Clause of the Fifth Amendment is intended to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . ." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (citation omitted).

Imagine, however, a real estate investor who learns that a mobilehome rent control ordinance has been passed in a city in which the investor owns no property. No matter how potentially onerous the law is—or in the future might become—that investor has little incentive, and no basis, to bring a Fifth Amendment takings action to challenge it.

Obviously, someone who does not own rental property cannot challenge a local rent control ordinance as an unconstitutional taking. Jurisdictional *and* substantive limitations would forbid it. As this Court has recognized in other contexts, "[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983); *accord Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1140 (9th Cir. 2000) (en banc). Even possible future plans to buy into the market would likely not suffice. A mere "theoretical" possibility that a law might

someday be applied to the plaintiff does not create a justiciable controversy that is ripe for review. *Thomas*, 220 F.3d at 1141; *see also id*. at 1149 (Kleinfeld, J., dissenting). And, of course, "[i]n order to state a claim under the Takings Clause, a plaintiff must first establish that he possesses a constitutionally protected property interest." *San Diego Police Officers' Ass'n v. San Diego City Employees' Ret. Sys.*, 568 F.3d 725, 740 (9th Cir. 2009) (citation omitted). Thus, whether characterized as a standing defect or one of substantive law, non-owners have been unsuccessful in bringing takings challenges to laws that do not affect them.[2]

These restrictions on the exercise of judicial power are well-settled, and we have no quarrel with them.

But now fast forward five, ten or even twenty years. The general rental market has dramatically risen since our hypothetical ordinance's passage. The impact on mobilehome park owners, perhaps once tolerable (or simply ignored), has been exacerbated exponentially. By now, it artificially depresses rents to roughly 80 percent of local market. Yet the law hasn't had any serious impact on affordable housing. In practical effect, all it has accomplished has been to artificially inflate the *sale prices* of mobilehomes, thereby nullifying the rental

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[2]*See, e.g.*, *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848-49 (9th Cir. 2001) (en banc), *aff'd sub nom.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Gebman v. New York*, 2008 WL 2433693, *5 (N.D.N.Y. 2008); *Butler v. Genda*, 2006 WL 314541, *2 (W.D. Va. 2006).

savings for any and all tenants who bought their homes, at a premium, after the law's passage. So, the only tenants who have truly realized any economic benefit from the protective legislation, and ever will, are the tenants who owned their mobilehome when the law took effect. Those original tenants either have been able to sell their mobilehome at a premium or have continued to rent their mobilehome pads at an artificially depressed price.[3]

Our hypothetical investor sees an opportunity to acquire a mobilehome park at a fair price, but also knows that her returns could be much higher were it not for the onerous (and ineffective) market regulation. Taking a gamble that the courts might strike the ordinance down, or that the political winds might turn, she buys.

Now, however, she *still* cannot bring a facial takings challenge to the law. For, as noted, it is the rule of *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), that if someone *buys into* a regulated market, they will lack standing to assert a facial takings challenge to the pre-existing regulation. What is more, because under this Court's precedents a facial takings claim is deemed to accrue upon a law's effective date, the Court's recent decision in *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 n.15 (9th Cir. 2008) suggests that our new owner's takings claim (in

[3]This discussion presumes familiarity with the basic contours of California's mobilehome housing market. *See generally Yee v. City of Escondido*, 503 U.S. 519, 523-24 (1992).

California) also will be time-barred since she bought into the regulated market many years after the law's enactment.

This heads-you-win, tails-I-lose state of affairs for new property owners is not just unfair, it is illogical. It depresses incentives for investors to buy into, or develop new housing, in the very markets that rent control laws are intended to protect (*i.e.*, those with housing shortages). And it makes governmental authorities far less accountable for their unconstitutional policy choices, even when those policies have failed to advance their intended goals as in this case. *See* Slip Op. at 13816 (discussing initial summary judgment ruling). It isn't difficult to imagine why an original property owner—who clearly would possess standing—might choose to acquiesce (or eventually sell) rather than mount an expensive, protracted legal challenge to a law that proves ever-more confiscatory over time. Yet by extinguishing a facial takings claim with the transfer of title, the present state of this Circuit's law guarantees an ever-diminishing pool of potential plaintiffs who might hold governmental authorities accountable to the Constitution. In short, it benefits practically nobody but those who legislate in excess of what the Takings Clause permits.

The Court should re-examine this conundrum.

B. *Carson Harbor*'s Standing Rule Should Be Expressly Overruled.

To recap, *Carson Harbor* held that a mobilehome park owner who did not own their mobilehome park at the time the challenged municipal rent control

ordinance was adopted lacked standing to assert that the ordinance violated the Takings Clause on its face. 37 F.3d at 476. Another *en banc* panel of this Court overruled a different aspect of the decision. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 2007) (en banc). This case presents an opportunity to expressly overrule its standing rule too.

To start with, *Carson Harbor* made little sense when decided. It reasoned as follows:

> In 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. A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because *he has suffered no injury*. The price paid for the property presumably reflected the market value of the property minus the interests taken. Carson Harbor has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property. (*Id*. at 476 (citations and original emphasis omitted; italicized emphasis added))

To suppose that a new owner is never injured by a law that artificially restricts the revenue she may derive from her new property is illogical. No matter what the price paid for the property, *she could earn a higher return on her investment if the law were not in place*. *Cf. Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976)

(doctors "no doubt . . . suffer concrete injury" from state law that denies Medicaid reimbursement for certain abortions because they would be benefitted by prevailing in their constitutional challenge "for they will then receive payment for the abortions"). The plaintiff who inherits a mobilehome park the day after a mobilehome rent control ordinance is enacted—and pays nothing—is no less injured than the plaintiff who bought at fair market value the day before. The difference between their economic losses may bear on the amount of compensation that may be due each plaintiff. But surely there is *injury*.

But even if *Carson Harbor* was correct when decided, its key rationale no longer is: that there can be no injury because "[t]he price paid for the property presumably reflected the market value of the property minus the interests taken." *Id*. at 476. The same could be said of a plaintiff who asserts that a pre-existing rent control ordinance effectuates a regulatory taking as-applied to her unique circumstances.[4] Yet under *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a new owner who acquires property already burdened by regulation is not foreclosed from asserting such a claim. *See id*. at 630.

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[4]For purposes here, the precise line between a facial and as-applied taking claim is immaterial. *See, e.g., Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) ("In a facial [takings] challenge, a court will look only to the regulation's 'general scope and dominant features leaving other specific provisions to be dealt with as cases arise directly involving them") (internal punctuation and citation omitted); *Equity Lifestyle Props., Inc.*, 548 F.3d at 1190 n.12 ("a facial challenge by its nature does not involve a decision applying the statute or regulation") (citation omitted).

Although *Palazzolo* does not discuss standing, the Supreme Court could not have reached the merits had it not determined that the plaintiff possessed standing under Article III. The Supreme Court has "an obligation to assure [itself] of litigants' standing under Article III" before proceeding to the merits (*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006)), even if the parties do not raise the issue. *See Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83, 95 (1998). The plaintiff in *Palazzo* petitioned for *certiorari* from a decision of the Rhode Island Supreme Court (*see id.* at 611; 28 U.S.C. §1257(a)), and a party who seeks Supreme Court review of a state court judgment must possess standing to invoke the federal courts' jurisdiction under Article III just like any other federal litigant. If it does not, the Supreme Court must dismiss review.[5] Since the Court decided *Palazzo* on the merits, implicit in its decision is that a new property owner *does* have standing to challenge an existing regulation that "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In addition to *Palazzolo*'s implicit holding that the plaintiff there had standing, the Court also expressly rejected *Carson Village's* central tenet. Its

[5]*See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (dismissing writ of *certiorari*); *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 435 (1952) (dismissing appeal); *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam) (dismissing review as improvidently granted); *id.* at 661-63 (Stevens, J., concurring) (discussing Article III limitations on Supreme Court review of state court judgments).

entire discussion of substantive takings law was devoted to rejecting the proposition that "subsequent owners cannot claim any *injury* from lost value" when they take title to property with notice of pre-existing regulations. 533 U.S. 626 (emphasis added). Thus, it explained that prior owners "must be understood to have transferred their full property rights" to the new owner, including the right to compensation for an unlawful regulatory taking. *Id.* at 629 (citation omitted). "[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." *Id*. at 629-30.

Equity Lifestyles Properties thus was correct: "the premise of *Carson Harbor* . . . was expressly rejected by *Palazzolo.*" 548 F.3d at 1190 n.11. Although *Equity Lifestyles Properties* declined to decide whether *Palozzolo* has "altered [this Circuit's] standing precedent" (*id*. at 1193 n.15), there is no reason for this *en banc* panel to desist. Now the Court should definitively hold that *Palazzolo* has done so.

C. The Statute of Limitations On A New Owner's Facial Takings Claim Should Commence No Sooner Than Its Acquisition of Title, And In Appropriate Cases Even Later.

The foregoing point, in some sense, leads inevitably to the next: the proposition that a plaintiff's facial takings claim can accrue (and in many cases expire) *before* the plaintiff acquired property burdened by the challenged regulation is not sound.

In this case, there is no question that the plaintiffs timely brought suit. The district court rejected a statute of limitations defense to their regulatory takings claim, concluding that the claim accrued on February 1, 2002 when the City of Goleta first adopted its rent control measure. ER 226-27. Since the plaintiffs brought suit less than two months later (ER 1 [March 25, 2002]), the district court ruled that their takings challenge to the City ordinance was timely. ER 227:22-25.

Neither the appellees nor any amicus (so far as we are aware) has contested that ruling on appeal. Moreover, the original three-judge panel in this case unanimously agreed that the plaintiffs' takings claim is timely. *See* Slip Op. at 13815 n.2; *id*. at 1386-87 (Kleinfeld, J., dissenting).

Nevertheless, both the majority and the dissent suggested that the result might have been different had there been no "gap in time" in which no rent control ordinance had been in effect with regard to the plaintiffs' park, because "[t]he statute of limitations for a facial takings claim begins to run with the passage of the challenged law." Slip Op. at 13815 n.2; *see also id*. at 13876 (Kleinfeld, J., dissenting).

This assumption, moreover, formed a critical part of Judge Kleinfeld's dissenting analysis as to why there was no *substantive* taking in this case. When the plaintiffs bought the trailer park in 1997, the dissent reasoned, "the statute of limitations had long since run on any takings claim arising from the County's

1979 and 1987 rent control ordinances," and thus "[t]he time-barred claims could not establish investment backed expectations." *Id*. at 13876.

We urge the Court to reconsider the original panel's assumption that a facial takings challenge to these older ordinances would have accrued immediately upon their passage *for a plaintiff who didn't own affected property at the time*. The Court should clarify that this is not the law or, at a minimum, not foreclose the possibility of its consideration in another appropriate case.

1. *Palazzolo* Rejected The Premise That New Purchasers Are Restricted to the Same Limitations Period as Their Predecessors.

It is the law of this Circuit that, when it would be futile for a plaintiff to seek compensation in state court, a cause of action under Section 1983 for a facial regulatory takings claim accrues upon a law's adoption.[6] *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir. 1993); *see also De Anza Props. X., Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085-87 (9th Cir. 1991); *Hacienda Valley Mobile Estates*, 353 F.3d at 655-56 (dictum).

In *Equity Lifestyle Properties*—cited by the majority panel opinion in this case (Slip Op. at 13815 n.2)—a three-judge panel of this Court extended this rule to a plaintiff who acquired its property after the adoption of the rent control

[6]This brief uses the term "adoption" for descriptive purposes only. Technically, "[i]n the context of a facial challenge under the Takings Clause, we have held that the cause of action accrues on the date that the challenged statute or ordinance *went into effect*." *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) (emphasis added).

ordinance it sought to challenge on facial takings grounds. *See* 548 F.3d at 1193 n.5.[7] The Court rejected the proposition that *Palazzolo*, 533 U.S. 606, "has eliminat[ed] any statute of limitations requirement." 548 F.3d at 1193 n.5. It then reasoned that "[u]nder our circuit law, the statute of limitations on a facial takings claim runs from the date when the statute is enacted." *Id*. Judged by that standard, the Court stated that the statute of limitations on the new owner's claim had expired on a date that was *12 years before the plaintiff had purchased the mobilehome park*. *Compare id*. at 1193 n.15 (expiration of limitations period) *with id*. at 1187 (date of purchase).

This aspect of *Equity Lifestyle Properties* is dictum. The Court held that the facial takings claim failed there for lack of standing and so "we do not have jurisdiction over this portion of [plaintiff's] claim." *Id*. at 1193 n.15 and accompanying text. If regarded as binding precedent, however, it should be overruled.

Palazzolo rejected such a rigid barrier to the constitutional rights of those who buy property affected by preexisting regulation. The Supreme Court held that subsequent property owners are equally entitled to challenge regulations under the Takings Clause:

> The Takings Clause . . . in certain circumstances allows a landowner to assert that a particular exercise of the State's

[7] *Cf. Daniel v. County of Santa Barbara*, 288 F.3d 375, 380-81 (9th Cir. 2002) (discussing an as-applied regulatory takings claim by new owners).

> regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. *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.* at 627 (emphases added))

Equity Lifestyle Properties is in direct contravention of *Palazzolo*. For under *Equity Lifestyle Properties*, governmental entities in California would effectively put an "expiration date" on facial challenges to land-use regulations.

To be clear, however, our point is not that *Palazzolo* has "eliminat[ed] any statute of limitations requirement." *Equity Lifestyle Props., Inc.*, 548 F.3d at 1193 n.5. Nor is it that *Palazzolo* has "undermine[d]" in any way, shape or form "the rule that 'a takings claim must comply with timeless requirements.'" Slip. Op. at 13880 (Kleinfeld, J., dissenting) (citing *Equity Lifestyle Props.*, 548 F.3d at 1190). Rather, *Palazzolo* bears on *when* a subsequent purchaser's takings claim accrues for limitations purposes. For it definitively holds that

"[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."[8] 533 U.S. at 627.

Palozzolo does not directly answer when, if not upon a law's effective date, a new owner's facial regulatory takings claim accrues. But the answer is implicit: no sooner than when the new owner acquires title. Otherwise, their "right to challenge unreasonable limitations" on their property would be meaningless.

This follows too from general principles governing the accrual of causes of action. "Courts have consistently held that a cause of action does not accrue until a party has a right to enforce the claim." *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986). To hold otherwise "in effect would bar [the plaintiff] from relief." *Norco*, 801 F.2d at 1146. As explained (Part A, *supra*), a plaintiff has neither standing nor any substantive basis to assert a facial takings challenge to regulation before the plaintiff owns property burdened by it. So the statute of limitations cannot begin to run on such a claim—much less expire—*before* then. Furthermore, "[a] statute of limitations under §1983 . . . begins to run . . . when the plaintiffs know or have reason to know of the injury that is the basis of their action." *RK Ventures, Inc. v. City of*

[8]Although state law determines the applicable limitations period in a Section 1983 action, "federal law governs when a cause of action accrues and the statute of limitations begins to run" in such a case. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379 (9th Cir. 1998).

Seattle, 307 F.3d 1045, 1058 (9th Cir. 2002). A plaintiff is not injured by regulation that facially violates the Takings Clause unless and until the plaintiff acquires property that is regulated. Before then, a plaintiff cannot "know or have reason to know" of any injury from the law. So, again, the statute of limitations cannot have already begun to run. For these reasons, a facial takings claim must accrue, at the earliest, when the plaintiff acquires an interest in property burdened by the challenged regulation.

Finally, there is a larger point to be made. The present accrual rule, if applied to new owners, would leave local regulatory laws in California facially intact forever, so long as those laws go unchallenged within a very short 2-year period from their adoption. Such an accrual rule would take no account of the possibility for changes in the law that might affect a law's facial validity under the Fifth Amendment, nor changed conditions on the ground. In such a case, the only alternative left would be potentially repetitive and piecemeal *as-applied* takings challenges to regulation, leaving the fate of even the most archaic (or, here, ineffective) regulation to a potentially wasteful and unnecessary process of death by a thousand cuts, when only one blow might suffice. Shutting the courthouse doors to those who might seek to vindicate a modern conception of what the Fifth Amendment facially requires "ought not to be the rule." *Palazzollo*, 533 U.S. at 627.

2. When The Economic Impact Of Regulation Unfolds Gradually, A Takings Suit May Be Postponed Until The Impact Has Become Fully Apparent.

The above analysis discusses just a floor: the *earliest* point at which a facial takings claim by a subsequent owner must be brought. But the plaintiffs' theory here was that, even if their case were properly viewed as a challenge to Santa Barbara County's earlier mobilehome rent control ordinances and not the later City enactment, they would not have been required to bring suit immediately upon the County's adoption of mobilehome rent control. *See* ER 179-83. The reason is because "the harm in question is continuing nature, sustained by the continued existence of the regulation." ER 183:1-2. Thus, they contended, much like gradual environmental contamination, "[t]he transfer of equity . . . caused by rent control is a continuing process," the harmful effects of which "tend to increase over time, as the disparity between market rent and the park's rent increases." ER 183.

The present plaintiffs have always characterized their takings claim as a faction one. The majority panel opinion agreed that such a claim could be maintained (Slip Op. at 13835-43), and concluded that the plaintiffs had proved it with, among other proof, evidence of general market conditions over time. *See id*. at 13843, 13848-49 (discussing district court findings concerning increased housing costs over five-year period from 1997 to 2003). Given the panel majority's approval of this facial claim, we address here why the statute of limitations cannot begin to run immediately. Rather, when the unconstitutional

effects of economic regulation do not become fully apparent until after an ordinance's effective date, a plaintiff must be permitted to delay a facial takings challenge.

This Court has recognized this very possibility in dictum. *See Ventura Mobilehome Cmtys. Owners Ass'n. v. City of San Buenaventura*, 371 F.3d 1046, 1052 n.4 (9th Cir. 2004).[9] It follows from the rule that suit must be brought under Section 1983 only "when the plaintiffs know or have reason to know of the injury that is the basis of their action." *Id*. (citing *RK Ventures, Inc*., 307 F.3d at 1058).

There is a direct analogy in the law of physical takings. Ordinarily, "[i]n a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known." *Palazzolo*, 533 U.S. at 628. But in *United States v. Dickinson*, 331 U.S. 745 (1947), the Supreme Court recognized that this is not true when physical harm from governmental action is *gradual*, and held that an owner in such a case may postpone suit until the situation has "stabilized" and "the consequences . . . have so manifested themselves that a final account may be struck." *Id*. at 749.

At issue in *Dickson* was flooding and erosion damage caused by the federal government's construction of a dam. The river was gradually raised 12 feet, and the plaintiffs' land was not permanently and completely flooded until the

[9]*Ventura* dismissed "facial and as-applied premium claims" to mobilehome park rent control regulation as unripe. *Id*. at 1053.

water had reached its high water mark. *See id*. at 746-47. The government contended that the applicable statute of limitations period under the Tucker Act (there, six years) began to run as soon as the dam became operational and partially submerged the plaintiff's property. *Id*. at 747. The Supreme Court rejected that argument. Its reason was because "[t]he source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous." *Id*. at 749.

In no uncertain terms—and for good reason—the Court rejected a rigid statute of limitations rule for takings claims of this sort. The Court first stressed the difficulty of determining precise accrual rules. "One of the most theory-ridden of legal concepts," it explained, "is a 'cause of action.'" *Id*. at 748. "This Court has recognized its 'shifting meanings' and the danger of determining rights based upon definitions of 'a cause of action' unrelated to the function which the concept serves in a particular situation." *Id*. (citation omitted).

In a key passage meriting full quotation here, the Court explained why a certain amount of flexibility is called for when assessing when a takings claim must be brought:

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or *in course of time*. *The Fifth Amendment expresses a principle*

of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. *If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain.* The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. *And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized*. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding *until the consequences of inundation have so manifested themselves that a final account may be struck.* (*Id*. at 748-49 (emphases added))

It thus concluded by stating its holding as follows:

When dealing with a problem which arises under such diverse circumstances *procedural rigidities should be avoided.* All that

> we are here holding is that when the Government chooses not to condemn land but to bring about a taking *by a continuing process of physical events*, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.' (*Id.* at 749 (emphasis added))

Although *Dickinson* involved a physical taking, there is no reason to so limit it. On the contrary, the Supreme Court has cited and endorsed its principles in the context of regulatory takings too. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986) (citing *Dickinson* for proposition that "a property owner is of course not required to resort to piecemeal litigation *or otherwise unfair procedures*" in order to assert a regulatory takings claim) (emphasis added); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting); *Penn Central Transp. Co.*, 438 U.S. at 146 (Rehnquist, J, dissenting).

What *Dickinson* said of the gradual physical damage by flooding rings equally true of the economic harm exacted by the mobilehome rent control regulation at issue here. As the plaintiffs argued below, "the premium may take years to appear" and "does not appear at once in a particular amount, but it varies over time . . . so that gradually, more and more property is transferred [to]

tenant [from] landlord."[10] ER 179:25-27. There is no more reason to force a mobilehome park owner to sue "as soon as his land is invaded" by onerous regulation whose confiscatory effects may take years to realize, than a landowner whose property is gradually beset by rising riverbanks. And there is every reason not to. The speculative damages and *res judicata* concerns articulated in *Dickinson* are equally valid in this context. Thus, as in *Dickinson*, the fact that a plaintiff might file such a takings claim earlier does not mean that it must.

This Court has not yet addressed this precise statute of limitations theory accrual for a facial takings claim. It has rejected the proposition that a *new* taking occurs, and thus a new cause of action accrues, each time a mobilehome tenant sells their home. *De Anza Properties X, Ltd.*, 936 F.2d at 1087; *see also Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 2002), *vacating* 740 F. Supp. 772 (C.D. Cal. 1990); *but see Azul-Pacifico, Inc.*, 973 F.2d at 705 (Kozinski, J., dissenting) ("*De Anza* is simply no longer good law for determining when a cause of action accrues for a takings claim"). In addition, *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), rejected a mobilehome park owner's argument that its facial takings claim did not accrue "until [local] property values [had] . . . increased dramatically years following enactment." 998 F.2d at 688. But *Levald* did so because it said such

[10]The inserted text is intended to correct an obvious misstatement in the original text ("from tenant to landlord").

evidence "was irrelevant" to a facial takings claim (*id*.); the plaintiffs' facial takings theory here, which the panel majority approved, *does* rely on evidence of rising property values. *See* Slip. Op. at 13848. *Levald* also rejected the proposition that a facial takings claim could be made to a mobilehome rent and vacancy control ordinance "at any point" (998 F.2d at 688)—which we do not here contend. To the extent its reasoning in that context casts doubt on whether a facial regulatory taking can involve a continuing injury, it should be reconsidered.[11]

For the reasons discussed in *Dickinson*, landowners should be permitted to postpone a facial takings suit until the effects of a confiscatory ordinance have become fully apparent. Though factual issues may arise in specific cases about when that precise time arrives, *Dickinson* leaves no doubt concerning the salient point for purposes here: the clock cannot begin ticking on such a claim the

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[11] *Levald* reasoned, tautologically, that "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," and said that "this is a single harm, measurable and compensable when the statute is passed." *Id*. at 688. However, it does not follow from the fact that a statute is challenged in its entirety across-the-board, rather than as applied to a particular set of facts, that its harm is "measurable . . . when the statute is passed." At the least, a plaintiff should be permitted to prove that the harm is *not* so measurable.

The governmental action in *Dickinson* that caused the plaintiff's harm arose from a discrete event too (damning the river); but the relevant question for timeliness purposes was not when that took place but when its full *effects* were felt. The Supreme Court said that "[t]he source of the entire claim" was "the overflow due to rises in the level of the river." 331 U.S. at 749. It was this, the consequential flooding, that the Court said "is not a single event; it is continuous" (*id*.), not the government's action that triggered the flooding.

moment a regulation takes effect. Such a rule indulges precisely the sort of "procedural rigidity" that *Dickinson* rejects. *Id*. at 749.

CONCLUSION

For the foregoing reasons, this Court should reaffirm that the plaintiffs do not lack Article III standing to assert their facial takings claim. In addition, it should clarify that the statute of limitations on their claim could not have begun to run before they bought their mobilehome park.

DATED: April 16, 2010

Respectfully,

BIEN & SUMMERS

By: /s/ AMY E. MARGOLIN

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure, because it contains 6,210 words, excluding those parts of the brief that the Rule exempts from the word-count limitation.

I also certify that this brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) because it is prepared in a proportionally spaced typeface with a 14.5 point font.

/s/ AMY E. MARGOLIN

CERTIFICATE OF SERVICE

I hereby certify that, on the date stated below, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that the below-identified participant in the case is not a registered CM/ECF user, and that on the date stated below I have mailed the foregoing document by First-Class Mail, postage prepaid to that participant at the following address:

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