

Case No. 06-56306

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

DANIEL GUGGENHEIM, SUSAN)
GUGGENHEIM, AND MAUREEN H.)
PIERCE,)
)
Plaintiffs and Appellants,) On Appeal from the United States
) District Court for the Central
) District of California,
v.)
) No. CV -02-02478-FMC
CITY OF GOLETA,)
Defendant and Appellee.)
)
)

**BRIEF OF AMICUS CURIAE
EQUITY LIFESTYLE PROPERTIES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Amicus Curiae Equity LifeStyle Properties, Inc. states that Equity LifeStyle Properties, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

INTRODUCTION

Equity Lifestyle Properties, Inc. (“ELS”), formerly known as Manufactured Home Communities (“MHC”), submits this amicus curiae brief regarding the rehearing en banc of the panel decision in *Daniel Guggenheim, Susan Guggenheim and Maureen H. Pierce v. City of Goleta*, Case No. 06-56306, which issued in favor of Appellants on September 28, 2009 (“panel decision”). ELS is the owner of numerous manufactured home parks in the State of California and is plaintiff in the matter *MHC Financing Limited Partnership and Grapeland Vista, Inc. v. City of San Rafael and Contempo Marin Homeowners Association*, Consolidated Case Nos. 07-15982, 09-16447, 09-16451, 09-16612, 09-16613, currently before this Court (“*San Rafael*”).

In *San Rafael*, following extensive trial proceedings, Chief Judge Walker of the United States District Court for the Northern District of California issued thorough findings of fact and conclusions of law determining that the application of the Mobilehome Rent Control Law in that case gave rise to an *as-applied* private taking, and an *as-applied* regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). ELS writes to emphasize that whether the application of a mobilehome rent control law gives rise to a *Penn Central* taking can best be analyzed based on a full evidentiary record and based upon factual determinations of the economic impact of the regulation, the commercial

impracticability of operating the regulated property, the magnitude and singularity of the burden on the property owner to redress a community-wide problem it did not create, and the reasonableness of investor expectations. Contrary to the unprecedented and unsupportable position taken by the City of Goleta and its amici, a law regulating rents for land at mobilehome parks is not *per se* beyond scrutiny as a *Penn Central* regulatory taking.

Although the fact record in the district court in *City of Goleta* differs from the fact record in San Rafael, ELS believes that the panel decision was correct. But, if for any reason this *en banc* Court does not adopt the panel decision, it should appropriately limit its rulings to the circumstances presented by a facial claim, which is all that is presented in this appeal. This Court should consider the distinct issues that are raised by an as-applied claim in the context of a case in which an as-applied claim was actually asserted and litigated, as in *San Rafael*.

The panel decision should be adopted. First, the panel decision comports with the decision in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The *Williamson* exhaustion doctrine is prudential, not jurisdictional. In circumstances in which a municipality has effected a taking of property and asserted that no compensation is due, the dispute over the entitlement to compensation is ripe; no purpose, prudential or otherwise, would be served by

requiring the landowner to exhaust all opportunities for state court litigation before it may seek redress in federal court for a federal constitutional injury.

Second, the panel appropriately analyzed and applied well-established *Penn Central* factors. *See Penn Central*, 438 U.S. at 123. In no event is there any basis for a blanket decision, advocated by the City and its amici, that *all* challenges to California mobilehome rent control ordinances must fail under *Penn Central*. Nor is there any basis for this Court to rewrite the *Penn Central* factors as the City and its amici advocate.

It is settled that under *Penn Central* the economic injury factor is measured principally based on diminution in fair market value. There is no basis to rewrite decades of jurisprudence and substitute a “return on investment” standard for measuring injury, as the City and its amici urge. That standard would make the constitutionality of a law dependent upon the bargaining power and business acumen of particular landowner and not on the economic injury to the property itself.

It is also settled that the “reasonable investor expectations” factor requires, among other things, determination of whether a law or regulation is consistent with all property owners’ objective expectations with respect to the fair and reasonable use of their property. It is objectively reasonable for any property owner to expect that a municipality would not enact or be permitted to continue to enforce a law

that creates an exponentially widening gap between market-based revenues and regulated revenues while fully capitalizing any putative benefits, as the City of Goleta's ordinance does. Such an ordinance bestows *no public* benefit whatsoever. Rather, it imposes a substantial private burden on a landowner and bestows only a fortuitous windfall upon an arbitrary group of private citizens.

Finally, it is well-established, as recently reaffirmed by the Supreme Court in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), that the character of the regulation is an important factor in any *Penn Central* analysis. The Supreme Court has clearly stated that this factor requires analysis of both whether the law singles out specific property owners to bear the burden of redressing a problem that was not caused by their property, and whether the effects of the regulation are comparable to a physical taking. There can be no doubt that the Goleta Ordinance singles out a particular property owner to bear the burden of redressing a problem that its property did not cause. It is also apparent that, as the Supreme Court appreciated in *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992), the effects of at least certain mobilehome rent control ordinances bear a substantial resemblance to the effects of a physical taking.

In sum, proper application of well-established *Penn Central* factors to Plaintiffs' facial claim warrants reversal of the district court ruling and adoption of the panel's opinion.

STATEMENT OF INTEREST

ELS is real estate investment trust, or REIT, which is publicly traded on the New York Stock Exchange. It owns and operates approximately 300 land lease manufactured home communities, *i.e.*, mobilehome parks, in approximately 30 states, including California.

ELS has a strong interest in this appeal as a California manufactured home park owner and litigant in another case pending before this Court. ELS initiated in the federal district court a lawsuit challenging the application to ELS's property of the City of San Rafael's mobilehome rent control law. After nearly ten years of litigation, the district court held that the City's enforcement and application of the law to ELS's property amounts to an unconstitutional private taking and a *Penn Central* regulatory taking. The district court issued a judgment that invalidates the law and phases it out over time. The City of San Rafael has appealed and the matter is currently pending before this Court. ELS has a strong interest in the vindication of constitutional protections that limit the ability of local government to take ELS's property without compensation. ELS also has a substantial interest in ensuring that Chief Judge Walker's decision, that ELS demonstrated an as-applied taking at its San Rafael property, is reviewed on the basis of the extensive findings of fact and evidentiary record in the *San Rafael* case, and that resolution

of this appeal is properly limited to the issues raised by this particular facial challenge.

ARGUMENT

I. THE PANEL DECISION COMPORTS WITH THE PRUDENTIAL REQUIREMENTS OF *WILLIAMSON*.

The City of Goleta and its amici contend that the panel was wrong to conclude that Plaintiffs' claim was ripe. A review of controlling law, however, confirms that the panel's conclusions were well-considered. The decision in *Williamson* identified prudential, not jurisdictional, concerns. Those prudential concerns provide no basis for requiring property owners to resort to state court litigation before they may bring a federal taking claim in federal court.

The determination of whether a plaintiff has adequately addressed ripeness concerns necessarily requires a fact-based inquiry. *See McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (concluding that the "facts presented" raised only prudential concerns). As the panel concluded, given the facts of this case, Plaintiffs have satisfied both Article III's ripeness requirement and *Williamson*'s prudential concerns.

A. *Williamson* Identified Prudential Considerations, Not Jurisdictional Requirements.

Although the requirement that plaintiffs present an actual "case or controversy" is jurisdictional, the Supreme Court's decision in *Suitum v. Tahoe*

Regional Planning Agency, 520 U.S. 725 (1997) makes clear that both prongs of *Williamson* are prudential. *Id.* at 733-34; *see also U.S. Const. Art. III.* In *Suitum*, the Supreme Court specifically stated, "[t]here are two independent **prudential** hurdles to a regulatory takings claim [citing *Williamson*] . . . a plaintiff must demonstrate that she has both received a 'final decision' . . . and [has] sought 'compensation'" 520 U.S. at 733-34 (emphasis added).

Because this case involves only a facial claim, one of the two *Williamson* prudential concerns, the final decision doctrine, is not applicable: "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).

Contrary to the assertion of the City and its amici, the second prudential concern, sometimes referred to as the "exhaustion" doctrine, does not raise a jurisdictional issue. In his concurring opinion in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), Chief Justice Rehnquist confirmed, with respect to *Williamson* exhaustion, that the Supreme Court has "referred to it as merely a prudential requirement." *Id.* at 349(Rehnquist, C.J., concurring) (citing *Suitum*, 520 U.S. at 733-34).

This Court has echoed that conclusion numerous times. In *McClung*, 548 F.3d at 1224 (9th Cir. 2008), this Court noted that the Supreme Court has described the ripeness of taking claims “as addressing prudential rather than Article III considerations.” *See also Beverly Blvd, LLC v. City of West Hollywood*, 238 Fed. Appx. 210, 212 (9th Cir. 2007) (holding that *Williamson* sets forth a prudential rule). *Accord, Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007)(“*Williamson County’s* ripeness requirements are prudential in nature”); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007) (citing *Suitum*, 502 U.S. at 733-34). More generally, the Supreme Court has recognized that a case may raise only prudential and not jurisdictional ripeness concerns. *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803, 809 (2003).

Article III requires the Court to analyze whether the plaintiff’s alleged injury is too imaginary or speculative to support jurisdiction. *See McClung*, 548 F.3d at 1224 (internal citation omitted). Here, as the panel explains, Plaintiffs allege concrete, calculable injuries based on the face of the Ordinance and the City, contending its law does not give rise to a taking, has refused to provide compensation. The jurisdictional ripeness of this controversy is firmly established by the years of litigation between the parties.

The City contends that under *Williamson* a plaintiff must exhaust every last opportunity to litigate rent increase petitions and state inverse condemnation procedures in state court before appearing in federal court. That argument is without either constitutional or prudential basis. There is no reason, jurisdictional or prudential, to require plaintiffs to pursue state court litigation exhaustively before they can present their federal taking claim in federal court.

B. Plaintiffs Should Not Be Required To Pursue State Court Litigation Before Proceeding In Federal Court On A Federal Taking Claim.

The Takings Clause prohibits a taking without just compensation. Thus entitlement to compensation accrues when the property is taken. Particularly where, as in this case, the City disputes that there has been a taking – there is a ripe case and controversy, over both whether the City has engaged in a regulatory taking and whether compensation is due. There is no reason to require the plaintiff to address that dispute first in state court before it may proceed in federal court. As Justice Rehnquist stated in his concurring opinion in *San Remo*:

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 in state court, in the absence of any asserted justification or congressional directive.

San Remo Hotel, 545 U.S. at 351 (Rehnquist, C.J., concurring).

The Supreme Court has held in other contexts that a party should not be required to litigate its federal constitutional or federal civil rights claims before an administrative body to gain access to federal courts. In *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516 (1982), for example, the Supreme Court held that plaintiffs suing under Section 1983 are not required to exhaust state remedies. *Accord, Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007)(same). There is no reason for a different result in takings cases.

By insisting that plaintiffs exhaust an action in state court before pursuing their constitutional claims in federal court, the City and amici effectively would require landowners, who often have limited resources due to the draconian impact of the very taking for which they seek compensation, to exhaust years in state court litigation pursuing remedies that are not designed to redress federal constitutional injuries.

Thus, the First Circuit has held that a state inverse condemnation or taking claim is remedial in nature, and therefore neither the “litigation of a state takings claim [nor] any general remedial cause of action under state law” qualifies as the procedure “aimed at providing compensation when government action effects a taking” under *Williamson. Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 16, 17 (1st Cir. 2007). In *Galarza*, 484 F.3d at 18, where the plaintiff claimed that Puerto Rico’s treasurer

improperly withheld money belonging to plaintiff so that it could be used for public purposes, the Court rejected the argument that to satisfy *Williamson* requirements, plaintiffs must file and exhaust a formal state inverse condemnation claim:

A takings claim seeks damages for the unconstitutional taking of property without due compensation. By contrast . . . an inverse condemnation proceeding is designed to enable plaintiffs to obtain compensation - which, if granted, would *avoid* the alleged constitutional violation that the takings claim is intended to remedy. . . . [R]equiring a state takings claim as a prerequisite to a federal takings claim effectively would impose an exhaustion requirement - which the Supreme Court explicitly said it did not do in *Williamson County*.

At minimum, where, as in this case, there has been state court litigation with respect to the challenged rent control ordinance, the City necessarily has had ample opportunity to provide compensation and necessarily has indicated that it contends no compensation is due. That disagreement, between parkowner and city, regarding whether there has been a taking and whether compensation is due, gives rise to a concrete case and controversy. Consistent with this view, this Court has recognized that virtually any form of state court litigation or administrative process can satisfy the prudential “exhaustion” doctrine. *See Ventura Mobilehome Communities Owners Ass’n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004). In *Ventura*, this Court listed various avenues for “exhausting” available state remedies, including applying for a rent increase, for a rent adjustment based on capital improvements, or for an additional discretionary rent

increase; or resorting to state court remedies. *Id.* Where a plaintiff can demonstrate that it sought and was denied compensation for “losses resulting from rent or vacancy control,” it can satisfy the second prong of *Williamson*. *Id.* If some resort to state court process is necessary – and it should not be – the panel was correct in finding that the extensive state court litigation between the parties to this appeal suffices.

This Court should adopt the panel’s reasoning and conclude that at least in the facts and circumstances of this case, both jurisdictional and prudential ripeness concerns have been satisfied.

II. THE COURT SHOULD NOT CREATE A *PER SE* RULE THAT MOBILEHOME RENT CONTROL CAN NEVER GIVE RISE TO A *PENN CENTRAL* TAKING

The City and its amici urge this Court to adopt a rule that would uphold all mobilehome rent control laws, no matter their effect on property owners and without limitation on the extent of the regulation or interference with property rights. They take the position that all such laws necessarily pass constitutional muster. (GSMOL Br. at 6-8; Goleta Br. at 6). A blanket rule that all mobilehome rent control laws are *per se* constitutional is untenable and would be wholly inconsistent with longstanding takings jurisprudence.

The Supreme Court set forth the basic principles underlying the Fifth Amendment Takings Clause in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415-16:

The general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public 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.

In *Penn Central*, the Supreme Court identified the key factors for determining whether a regulation “goes too far.” *Penn Central*, 438 U.S. at 124. Application of the *Penn Central* factors in each case requires a court to engage in an essentially “ad hoc, factual” inquiry, and the outcome in each case will depend on the specific facts involved. *See Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986). That ad hoc factual inquiry was recently validated by the Supreme Court’s decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539-40 (2005).

The Fifth Amendment precludes a *per se* rule. The Supreme Court has “eschewed the development of any set formula for identifying a ‘taking’ forbidden by the Fifth Amendment, and ha[s] relied instead on ad hoc, factual inquiries into the circumstances of each particular case.” *Connolly*, 475 U.S. at 224. The Court has, however, identified three factors that have “particular significance” to whether a regulation “goes too far” and caused a compensable taking to occur: (1) “the

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.” *Penn Central*, 438 U.S. at 124. These factors were more recently re-affirmed in *Lingle*, 544 U.S. at 540.

The ultimate outcome of a court’s application of the *Penn Central* factors is highly dependent upon the specific facts and circumstances of the particular case. Justice O’Connor, in her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001), reiterates that “[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.” The panel decision in *Goleta* did not depart in any significant respect from a standard application of the *Penn Central* factors. The City, on the other hand, invites this Court to depart from decades of jurisprudence and ignore or revise the standards established by the Supreme Court. This Court should decline that invitation.

A. The Panel Properly Determined The Economic Impact Of The Challenged Regulation.

The first factor in the *Penn Central* analysis is the economic impact of the government action on the plaintiff’s property. The plaintiff must present evidence showing a “‘serious financial loss’ from the regulatory imposition.” *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.2d 1171, 1177 (Fed. Cir. 1994)).

The Supreme Court has measured the economic impact of a regulation in several different ways, including: (a) comparing the value of the affected property before and after a regulatory action, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 490, 497 (1987); (b) looking to the current market value of the property, *Hodel v. Irving*, 481 U.S. 704, 714 (1987); (c) evaluating whether the regulation makes the property owner's business "commercially impracticable," *Keystone*, 480 U.S. at 493-96; and (d) evaluating the possibility of other economic uses of the land besides a sale, *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

The City of Goleta and its amici contend that any rent control law that affords a parkowner a "fair return on investment" cannot have a sufficient economic impact to give rise to a taking. (City Br. at 8; League Br. at 15-16; GSMOL Br. at 12-13). But the City's novel contention is at odds with well-settled law and would immunize from scrutiny rent control laws that eliminate most of the fair market value of a property.

The absurdity of the City's "fair return on investment" theory is illustrated by considering a property that would sell for \$1 million absent a rent control ordinance and an ordinance that limits the rents that may be charged on that property to 10 cents a year. Under that ordinance, the value of the \$1 million property may be diminished to \$1. Yet, under the City's standard, if a party purchased that property for \$1, and then earned 10 cents a year on the land, that

purchaser would have received a fair (10%) return on its investment and, according to the City's reasoning, the law would be immune to challenge under *Penn Central*.

For obvious reason, the courts have not used a "return on investment" standard as a principal means of measuring the economic impact of a regulation on a property under *Penn Central*. Return on investment reflects, at most, the impact of a regulation on a specific property owner – not on the property itself; and its impact necessarily depends upon the bargaining acumen and resourcefulness of different property owners. Thus, it is well-settled that when measuring the economic impact of a regulation, the proper starting point for measurement is the fair market value of the property itself absent the regulation. *See, e.g., Youpee v. Babbitt*, 67 F.3d 194, 200 (9th Cir. 1995). As the Supreme Court has recognized:

The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Olson v. United States, 292 U.S. 246, 255 (1934) (emphasis added). The Court further noted that market value "may be more or less than the owner's investment. . . . The public may not by any means confiscate the benefits, or be

required to bear the burden, of the owner's bargain. He is entitled to be put in as good a pecuniary position as if his property had not been taken." *Id.*

As a corollary, the courts have consistently recognized that the measure of damages for a taking must be based upon the diminution in the fair market value of the property. Under the Just Compensation Clause of the Fifth Amendment, a property owner whose land is taken by the government is entitled to compensation that reflects the "market value of the property at the time of the taking contemporaneously paid in money." *Id.* (citations omitted). "When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value." *Palazzolo*, 533 U.S. at 625. "Market value" is "what a willing buyer would pay in cash to a willing seller at the time of the taking." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

The courts rely on the diminution in the market value to calculate the compensation due.¹ In *Yancy v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990), for example, the federal court held that the challenged regulation diminished the value of the property by 77 percent and that "fair market value

¹ The City of Goleta and amici rely on *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) and *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915), to support the assertion that a substantial decrease in value is not sufficient to show economic impact or support a finding that a taking has occurred. This reliance is misplaced. In *Concrete Pipe*, the court concluded that none of the other *Penn Central* factors pointed to a taking and that a requirement that the company pay 46% of shareholder equity was by itself not sufficient to constitute a taking. 508 U.S. at 645. Both *Village of Euclid* and *Hadacheck* pre-date *Penn Central* and therefore do not even involve an evaluation of economic impact.

should be used to determine the amount of compensation.” *See also Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 43 (Ct. Cl. 1999) (value of the property diminished by 73.1 percent). The courts would not use diminution in market value as a measure of damages if it were not also the measure of injury.

Accordingly, this Court should reject the City’s request that it rewrite *Penn Central* and make return on investment, rather than diminution in fair market value, the benchmark of a law’s economic impact.

B. The Panel Properly Considered The Plaintiff’s Objective Investment-Backed Expectations.

The second factor a court must consider under *Penn Central* is “the extent to which the regulation has interfered with distinct investment-backed expectations.” *Penn Central*, 438 U.S. at 124.² “[A] court must first verify that the property owner actually had investment-backed expectations and then examine whether those expectations were objectively reasonable.” *CCA Assocs. v. United States*, 75 Fed. Cl. 170, 191 (Ct. Cl. 2007); accord *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).

Contrary to the position taken by the City of Goleta and its amici, the fact that a landowner is aware of a draconian and irrational regulation at the time it

² “Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree 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.’” *Palazzolo*, 533 U.S. at 634 (O’Connor, J., concurring) (emphasis in original).

purchases property is not determinative of whether its reasonable investment-backed expectations include the expectation that the regulation would continue in perpetuity. As Justice Scalia noted in his concurring opinion in *Palazzolo*: “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.” 533 U.S. at 637 (Scalia, J., concurring).

It is objectively reasonable for a landowner to believe that, like other property owners who lease their land, over time it will be able to collect rents that reflect market conditions. More significantly, it is reasonable for landowners to expect that irrational and draconian regulations that fully capitalize a regulation’s putative benefit and, as a consequence, confer no public benefit and serve no public purpose, will not continue in perpetuity. More specifically, a reasonable property owner in California should expect that, given the demonstrated failure of mobilehome rent control to advance any public purpose, rational legislators would not enact, enforce or perpetuate such laws, and/or that courts would enjoin their continued application.

The reasonableness of those expectations is reflected in the very fact that the panel’s decision is the *third* time that the Ninth Circuit has held that certain mobilehome rent control ordinances amounted to an unconstitutional taking. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 (9th Cir. 1986) and *Cashman*

v. City of Cotati, 374 F.3d 887, 897 (9th Cir. 2004). Although in prior instances the Supreme Court subsequently clarified the applicable legal standards, the underlying vices that gave rise to this Court’s constitutional concerns have not changed. In *Hall*, 833 F.2d at 1280, this Court found a rent control ordinance amounted to a physical taking. The Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519, 526-27 (1992)), later clarified that the challenged ordinance could not be classified as a physical taking, but it also found that the same ordinance might constitute a regulatory taking. In *Cashman*, 374 F.3d at 897 (vacated on other grounds by 415 F.3d 1027 (9th Cir. 2005)), this Court found that the City of Cotati rent control ordinance constituted an unconstitutional regulatory taking under the “failure to substantially advance” theory. The Supreme Court in *Lingle*, 544 U.S. 528 (2005), did not dispute the underlying facts of the case, but ruled that *Penn Central* set forth the more appropriate legal standard to apply to a regulatory taking. In each case, this Court concluded that a rent control regulatory scheme improperly infringed on a property owner’s constitutional rights.

Landowners also have a reasonable expectation that any law will be applied fairly and equitably. They should not be required to lower their expectations merely because government enacts or enforces arbitrary regulation or engages in unlawful conduct. *See Penn Central*, 438 U.S. at 136.

This Court should adopt the panel’s reasoning that the parkowner has a reasonable expectation that unconstitutional laws will not remain in place in perpetuity.

C. The Panel Properly Examined The Character Of Government Action.

The final *Penn Central* factor is the character of the government action. This factor requires courts to “balance the liberty interest of the private property owner against the Government’s need to protect the public interest through imposition of the restraint.” *Cienega Gardens*, 331 F.3d at 1338 (quoting *Loveladies Harbor*, 28 F.3d at 1176). In this portion of the *Penn Central* analysis, a court considers, among other things, whether the law “singles out” a landowner to bear a public burden and whether the law functions “like” a physical taking.

1. Goleta’s Ordinance Singles Out Landowners Who Did Not Contribute To Creating The Public Burden.

The fundamental purpose of the Takings Clause is 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.” *Lingle*, 544 U.S. 528 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Hence, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Penn. Coal Co.*, 260 U.S. at 415.

To determine whether a government regulation forces a landowner to carry a disproportionate share of a public burden, the Court must examine both the burden that a regulation imposes upon private property rights and how the regulatory burden is distributed among property owners. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 836 & n.4 (1987). In *Nollan*, the Court suggested that if the plaintiffs are “singled out to bear the burden of California’s attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate . . . the Takings Clause.” 483 U.S. at 836 & n.4.

Mobilehome park landowners generally carry a disproportionate burden of redressing a public problem they did not contribute to creating. In strong contrast to a regulation that is aimed at regulating, for example, a specific parcel from which a public nuisance originates, mobilehome rent control regulation punishes the landowners who had *no* role in creating the public problem. Mobilehome parkowners like ELS and the Guggenheims already contribute to the solution by providing additional sources of more affordable housing to a community. There is, therefore, no rational basis to require these landowners to bear a disproportionate share of the burden of ensuring that affordable housing is available to the public.

2. Goleta's Ordinance Closely Resembles A Physical Taking.

The Supreme Court in *Penn Central* held that “a ‘taking’ may be more readily 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 (internal citations omitted); *see also Lingle*, 544 U.S. at 539.

As discussed above, this Court held that the application of mobilehome rent control gave rise to a physical taking. *See Hall*, 833 F.2d at 1280. Although the Supreme Court in *Yee* found no *per se* physical taking, it made that finding only because the parkowner had the apparent option of changing the use of the land or going out of business. The Supreme Court in *Yee* specifically noted that although mobilehome rent control is not *per se* a physical taking, “[a] different case would be presented were the statute . . . to compel a landowner over objection to rent his property....” 503 U.S. at 528. The Supreme Court did not disagree with this Court’s conclusion that the effects of the mobilehome rent control law were equivalent to a physical taking, as long as the park was in operation.

Thus, the panel was correct in reasoning that the character of the regulation at issue in this case militates strongly in favor of finding a *Penn Central* taking.

* * *

Contrary to the dire consequences predicted by the City of Goleta and its amici, the panel decision does not constitute a significant departure — or any departure — from well-settled law. The ad hoc, factual inquiry that *Penn Central* requires guarantees that each case will be considered on its merits and the resulting decision based on the unique set of facts presented to the Court. The panel decision's *Penn Central* analysis applied the *Penn Central* principles to the facts presented in the record correctly. Therefore the Court en banc should reach the same conclusions for the same reasons as the panel did.

CONCLUSION

For the foregoing reasons, ELS respectfully requests that the Court affirm and adopt the reasoning of the panel decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 29(d) of the Federal Rules of Appellate Procedure and Circuit Rules 29-2(c) and 32-1, the foregoing amicus brief is proportionally spaced, has a typeface of 14-point Times New Roman type, including footnotes and contains less than 7,000 words.

CERTIFICATE OF SERVICE

I hereby certify that, on April 16, 2010, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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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