No. 06-56306

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

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DANIEL GUGGENHEIM, SUSAN GUGGENHEIM,
and MAUREEN H. PIERCE,
*Plaintiffs-appellants*,

v.

CITY OF GOLETA, a municipal corporation,
*Defendant-appellee*.

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On Appeal from the United States District Court
for the Central District of California
Case No. CV-02-02478-FMC
Hon. Florence Marie Cooper, United States District Judge

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# BRIEF OF MANUFACTURED HOUSING EDUCATIONAL TRUST, GOLDSTEIN PROPERTIES, INC., AND MORGAN PARTNERS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* hereby certifies that Manufactured Housing Educational Trust is a nonprofit corporation and has no parent corporation. No publicly held corporation owns any part of Manufactured Housing Educational Trust.

Counsel for *amici* further certifies that Goldstein Properties, Inc. and Morgan Partners, Inc. are both privately-held corporations. Neither has a parent corporation, and no publicly held corporation owns 10% or more of the stock of either Goldstein Properties, Inc. or Morgan Partners, Inc.

Dated: April 16, 2010

_/s/ Meaghan McLaine VerGow_
Meaghan McLaine VerGow
Counsel for *Amici Curiae*
Manufactured Housing Educational Trust,
Goldstein Properties, Inc., and
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## INTEREST OF *AMICI*

*Amicus* Manufactured Housing Educational Trust ("MHET") is a nonprofit trade association of mobile home and manufactured housing community owners, serving Orange, Riverside, and San Bernardino Counties in California. MHET acts as an information resource on manufactured housing communities for local elected officials, city staff, community owners, and residents. *Amici* Goldstein Properties, Inc. and Morgan Partners, Inc. are the owners of nearly a dozen mobile home parks in California. As mobile home park owners and advocates, *amici* have a longstanding interest in and unique perspective on the takings issues raised by this case.

## SUMMARY OF ARGUMENT

Mobile home rent control laws in California directly transfer wealth from mobile home park owners to mobile home residents. Because mobile home residents own their coaches, they are able to sell their homes at a substantial premium to purchasers who pay for the future benefit of legally controlled rent. Residents thus capture value in the land that would otherwise belong to park owners. Although purporting to promote affordable housing, mobile home rent control laws frustrate that goal, while saddling a small population of mobile home park owners with expensive public burdens that should be borne by taxpayers as a

whole. The panel therefore correctly concluded that the rent control ordinance in this case constitutes an unconstitutional regulatory taking.

The panel also correctly reached the merits of that claim, and the en banc Court should clarify the standing and ripeness rules in this circuit for the benefit of the district courts and future litigants. The plaintiffs in this case have standing to bring their facial challenge despite having purchased their property after the first rent control ordinance went into effect. The Supreme Court has recognized that subsequent purchasers bear the costs of governmental takings and should be able to vindicate economic injuries occasioned by excessive regulation.

Plaintiffs' claim also is ripe, even though they have not sought compensation in state court. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requires plaintiffs making certain as-applied takings challenges to seek compensation in state court first. But that requirement does not apply to plaintiffs who raise a facial regulatory takings challenge because in that context the Government has no intention of compensating all parties subject to the regulation. In any event, *Williamson County*'s ripeness rule is prudential and should not be applied when, as here, the dispute is clearly fit for judicial resolution.

## ARGUMENT

### I. MOBILE HOME RENT CONTROL CAUSES A TRANSFER OF WEALTH, CONTRARY TO CONSTITUTIONALLY PROTECTED OWNERSHIP INTERESTS AS WELL AS THE COMMON GOOD

The question presented in this case is whether the rent control ordinance in the City of Goleta takes mobile home park owners' equity interest in their property and transfers it to mobile home residents without just compensation in violation of the Fifth and Fourteenth Amendments. The resolution of that question requires an understanding of how mobile home rent control directly transfers wealth from mobile home park owners to mobile home residents.

In the United States, the use of mobile home residences took off after World War II, providing an affordable form of home ownership for many Americans. Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 401-03 (1988) ("Hirsch I"). Virtually all mobile home residents own their coaches but lease the land on which the coach sits from a mobile home park owner, making them mobile home tenants. *Id.* at 405-06. Notwithstanding their name, mobile homes are not, in fact, very mobile; roughly 99% of mobile home coaches are not moved during their lifetime. *Id.* at 404-05.

Beginning in the late 1970s, California lawmakers enacted a series of mobile home laws aimed at promoting affordable housing. *Id.* at 420. At the state level,

the California Mobilehome Residency Law ("CMRL") granted rights to mobile home tenants that go well beyond those enjoyed by an ordinary residential tenant. The CMRL severely constrained mobile home park owners' ability to select tenants, to evict them, and to terminate month-to-month tenancies. It also limited owners' ability to convert their parks to different, better uses. Cal. Civ. Code §§ 798.55(b)(1), 798.56, 798.58, 798.73, 798.74, 799.4.

At the same time, local mobile home rent control ordinances began to proliferate. The ordinances combine rent control with vacancy control: rent control establishes a ceiling on the rent that owners can charge tenants, while vacancy control forbids or limits increases in the rent that owners can charge to tenants to whom a coach has been transferred. Those ordinances have not served their intended purpose and have had calamitous effects for mobile home park owners. Rather than increase the stock of affordable housing, the laws have transferred the bulk of equity in the mobile home park property from the owners to a subclass of tenants. The laws have thus proved both economically unsound and fundamentally unfair.

### A. Mobile Home Rent Control Directly Transfers Wealth From Owners To Tenants

The combination of rent control and vacancy control allows mobile home tenants to sell their coaches with an entitlement to a fixed rent for the land occupied by the coaches. As a result, the market value of the land on which the

coach is located is not enjoyed by the park owner, but is instead captured entirely by the mobile home tenant who happens to be in occupancy at the time that a rent control standard is enacted.

Economists have explained how rent control laws effect this transfer of wealth from park owners to their tenants.[1] UCLA Professor of Economics Werner Hirsch first developed an economic theory to explain this phenomenon in the late 1980s. *See* Hirsch I at 399; Werner Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212, 215 (1988) ("Hirsch II"). Hirsch defined the "placement value" of a coach as the difference between the sale price of a coach on a pad in a park and the combined costs of an equivalent coach in a showroom plus transportation and hook-up charges. Hirsch I at 426. The

[1] *See generally* Diehang Zheng et al., *An Examination of the Impact of Rent Controls on Mobile Home Prices in California*, 16 J. Housing Econ. 209 (2007), *available at* http://ssrn.com/abstract=937835; Carl Mason & John M. Quigley, *The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California*, U.C. Berkeley: Berkeley Program on Housing and Urban Policy (2006), *available at* http://escholarship.org/uc/item/44d7h9hs; John M. Quigley, *The Economics of Mobile Home Rent Control: A Case Study of Goleta, California* (Aug. 11, 2004) (unpublished report on file); Werner Z. Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets Under Divided Ownership*,19 Int'l Rev. L. & Econ. 383 (1999); Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3 (1992); Daniel L. Rubinfeld, *Regulatory Takings: The Case of Mobile Home Rent Control*, 67 Chi.-Kent L. Rev. 923 (1992); William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865 (1991); Werner Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212 (1988); Hirsch I at 399.

placement value of a coach in a park in a competitive market should be zero. Under rent control, however, the placement value increases to the difference between the rent that may be lawfully charged and the market value of the rent. *Id.* at 427-28. The consequential increase in coach value reflects the economic effect of the rent control ordinance. *Id.* at 425.

Because mobile home rent control allows the current tenant to capture the placement value, it causes a dollar-for-dollar transfer of wealth from the owner to the tenant that amounts to the difference between what the owner could have charged in a fair market and what the government allows the owner to charge. *Id.* This transfer of wealth is a "windfall gain" to the tenant; future tenants pay a premium to current tenants for the right to pay a reduced rent. Hirsch II at 212; Hirsch I at 447 n.138. The figures in this case dramatically illustrate this transfer of wealth: a tenant who purchased a mobile home for $12,000 before rent control became effective could now sell it for $100,000, realizing $88,000 in equity that would otherwise belong to the park owner. *See Guggenheim v. City of Goleta*, 582 F.3d 996, 1022 (9th Cir. 2009).

Economists who have studied the effects of mobile home rent control in California have been able to quantify the premium on coaches caused by rent control laws. For example, for the years between 1984 and 1986, economists identified a rent control premium of $8,800, or 32% of the value of the coach.

Hirsch I at 440, 443. More recently, Professor John Quigley of the University of California at Berkeley studied the sale of coaches in San Rafael, California, in 2002, and found a premium of $61,000 per coach, or two-thirds of the resale price of the coach. R.S. Radford, *Does Rent Control Fail to Substantially Advance Legitimate State Interests—and Why Does It Matter After* Lingle*?*, SL012 A.L.I.-A.B.A. 205 (2005) (citing John M. Quigley, *Economic Analysis of Mobile Home Rent Control: The Example of San Rafael, California* (September 12, 2002) (unpublished report)).[2]

In 2004, Dr. Quigley did a study of the Rancho Mobile Home Park—the park at issue in this case. That study concluded that the economic value of rent control averaged about $105,000 for each mobile home sold since January 1999. John M. Quigley, *The Economics of Mobile Home Rent Control: A Case Study of Goleta, California* 16 & T-2 (Aug. 11, 2004) (unpublished report on file) ("Quigley"). That amounts to a staggering 87% of the value of the coach. *Id.*

A 2006 case study of Santa Barbara, Marin, and San Diego Counties reached similar conclusions. In Santa Barbara County, the results were the same as in the

[2] The district court in the Northern District of California recently issued a decision finding that the San Rafael ordinance constituted a regulatory taking. *MHC Financing, Ltd. v. City of San Rafael*, 2008 WL 440282, at *17 (N.D. Cal. 2008). The court found that tenants captured a premium of $67,000, equal to the value of the difference in rent. *Id.* at *7-*8. Between the trial and the court's decision, the average premium went up to $98,000, or 82% of the value of the coach. *Id.* at *9. The court concluded that the plaintiff was deprived of almost $100 million in value. *Id.* at *12.

Rancho study: $105,000 per coach, or 87% of the resale value of the coach; in Marin County, the premium was $61,000 per coach, or 67% of the coach's value; and in San Diego County, the premium was $24,000, or 48% of the coach's value. Carl Mason & John M. Quigley, *The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California*, U.C. Berkeley: Berkeley Program on Housing and Urban Policy 21 (2006), *available at* http://escholarship.org/uc/item/44d7h9hs ("Mason & Quigley"). Finally, in the most ambitious study to date, Diehang Zheng and his colleagues at the University of Southern California examined the impact of mobile home rent control in seven California counties between 1983 and 2003. Diehang Zheng et al., *An Examination of the Impact of Rent Controls on Mobile Home Prices in California*, 16 J. Housing Econ. 209, at 3 (2007), *available at* http://ssrn.com/abstract=937835. Their results confirmed the results of previous economic studies—that mobile home rent control in California has led to the transfer of hundreds of millions of dollars from owners to tenants. *See id.* at 17.

### B. Mobile Home Rent Control Burdens Park Owners With Costs That Should Be Borne By The Public And Undermines The Common Good

The principal motivation behind mobile home rent control is to preserve affordable housing by forestalling unwarranted rent increases by park owners. Because rent control regulation uniquely burdens park owners at no public cost,

lawmakers have had little incentive to scrutinize its impact. But rent control laws are, in fact, economically unsound, and their effect has been to undermine the common good. *Cf. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123, 124 (1978) (query whether law alleged to be a taking "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" or simply "adjust[s] the benefits and burdens of economic life to promote the common good").

Legislators pressing mobile home rent control regulation fear that mobile home park owners are in a position to price-gouge their tenants. That fear rests on the practical immobility of coaches. While a coach owner facing an unreasonable rent increase can move his coach to another, cheaper park, it only makes economic sense to do so if the difference in rent exceeds the costs of transporting the coach. When transportation costs are high, the theory goes, the park owner will be able to extort an unreasonable rent increase roughly equal to the cost of moving the coach—what Professor Hirsch calls the "quasi rent." Hirsch I at 419-20.

But in fact, as economists explain, market forces preclude park owners from extracting quasi rent even without the intervention of rent control. *See* Quigley at 30; Mason & Quigley at 7. Critically, mobile home park owners compete for residents with other park owners as well as with owners of other forms of housing. Accordingly, if park owners increase rents beyond reasonable market rates, tenants

will opt *ex ante* for different parks or for other forms of housing such as apartments, condominiums, or single family homes. Quigley at 31; Mason & Quigley at 7-8. Reputational constraints further curtail the ability of an owner to extract quasi rent. Any price gouging effort would be readily observable in tight-knit mobile home communities, and the response would be predictable. Not only would prospective tenants be far less likely to rent from a price-gouging owner, but current tenants would be far more likely to leave. Quigley at 31; Mason & Quigley at 8-9. Together, these responses would increase the vacancy rates in the park and cause the owner to lose money. As a result, it is simply not in the owner's interest to seek quasi rents. Mobile home rent control thus cannot be rationalized as targeting a population responsible for the burdens imposed. Rather, it forces park owners to shoulder the costs of an affordable housing program that should be spread among the taxpaying base.

Equally troubling, the ordinances fail to accomplish their ultimate purpose of promoting affordable housing, and indeed undermine it. As explained above, future tenants pay for the future benefit of decreased rent when they purchase coaches that are sold well above what they would go for on non-rent-controlled land. At best, the ultimate cost of housing for future tenants is no less expensive than it would be absent rent control. And if the higher purchase price leads to higher mortgage costs, or if the tenant overestimates the future value of rent

control, the ultimate cost of housing would actually be more expensive. *See* Hirsch I at 431; *see also* Quigley at 26 ("All incoming tenants to the park pay the full market price for housing."); *id.* at 1 ("For every dollar by which housing costs are reduced through lower mobile home rents, consumers are forced to pay higher purchase prices for those mobile homes."). The only beneficiary is the tenant at the time a rent control ordinance is enacted. That tenant is able to capture the value of the mobile home pad at the expense of the park owner.

*Amicus curiae* Golden State Manufactured-Home Owners League argues that because mobile home residents invest more in their coaches than apartment dwellers do in their apartments, they are entitled to build such equity. The argument is unpersuasive. Mobile home owners should be entitled to build equity in their *coaches*, because their coaches are *their* property. To the extent tenants have invested in their coaches, that investment can be captured when they sell the coach even in a park that is not rent-controlled. For example, a tenant who upgrades to granite countertops may see a return on investment upon sale. There is no basis in law, however, for awarding mobile home residents the right to accumulate equity in the land of which they are tenants. It is implausible to suggest that a tenant's investment in countertops entitles him to the difference between the fair market value of the land and the value set by rent control. That difference properly belongs to the owner of the land.

Mobile home rent control does not simply fail to confer a public benefit—it actually harms the public good. Because rent control eliminates any meaningful return on investment, park owners have an incentive to reduce investments in the park. Hirsch I at 431; Quigley at 3. The inevitable result is a decrease in the overall quality of mobile home pads. Park owners also have the incentive to offset their losses by converting the parks to more profitable land uses whenever possible. And if park owners cannot make a fair return on their investment, fewer parks will be built in the future. Hirsch I at 431. These adverse effects have been documented in California. Over a period of 25 years, annual shipments of mobile homes to California declined by nearly 25,000 units. *Id.* at 463; Werner Z. Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets Under Divided Ownership*,19 Int'l Rev. L. & Econ. 383, 393 (1999). The decrease in mobile home parks reduces the overall supply of affordable housing, which, in turn, increases rents in the local economy. Hirsch I at 432 n.114; Quigley at 2. Those costs are borne by all consumers and still further undermine the affordable housing goals the rent control ordinances are purportedly designed to serve.

* * *

The legal case for finding a taking in this case has been fully briefed by other parties and will not be repeated here. The above evidence shows, however, that mobile home rent control in California accomplishes a dramatic transfer of

wealth from park owners to a few private parties while undermining the common good. The City's regulation "goes too far," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and must be recognized as an unconstitutional taking.

## II. THE PANEL PROPERLY REACHED THE MERITS OF PLAINTIFFS' CLAIM

The City's petition for rehearing focused on the merits of the panel's takings holding, and thus the plaintiffs' rehearing briefing did the same. The League of California Cities ("LCC") argues, however, that that there are threshold standing and ripeness barriers that preclude reaching the merits. Those arguments are incorrect.

### A. Any Person Who Alleges Economic Injury Has Standing To Bring A Facial Takings Claim

In *Carson Harbor Village v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), this Court held that purchasers who acquire property after a challenged law goes into effect lack standing to challenge the law. Relying on *Carson*, *Amici* League of California Cities et al. ("LCC") suggest that plaintiffs lack standing even though they suffer substantial, ongoing monetary loss as a result of the City's rent control ordinance. LCC Br. 10-14. As the panel correctly found, *Carson Harbor Village* has no application here because plaintiffs are not subsequent purchasers. Rent control lapsed before its adoption by the City, and thus became effective *after* plaintiffs' acquisition of their property. *Guggenheim*, 582 F.3d at 1006.

More fundamentally, however, *Carson Harbor Village* was incorrectly decided and has been undermined by intervening Supreme Court precedent. The en banc Court should therefore take this opportunity to overrule *Carson Harbor Village*.

*Carson Harbor Village* reasoned that "the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property," that "[t]his is a single harm, measurable and compensable when the statute is passed," and that therefore "[a] landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury." 37 F.3d at 476 (emphasis removed; quotation omitted). That analysis conflicts with the Supreme Court's intervening decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

In *Palazzolo*, the Court rejected the Rhode Island Supreme Court's holding that "a successive title holder" is "barred from claiming" that an earlier enacted statute "effects a taking." *Id.* at 626. The Court explained that a taking does not "become less so through passage of time or title," that there is no "expiration date on the Takings Clause," and that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 627. The Court added that the Rhode Island Supreme Court's rule would unfairly prejudice the rights of the owners at the time of enactment by stripping them "of the ability

to transfer the interest which was possessed prior to the regulation." *Id.* The Court concluded that "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership." *Id.* at 628.

The LCC disputes that *Palazzolo* changed the standing requirements for facial challenges, noting that the case "did not even mention standing," and that it involved an as-applied challenge rather than a facial challenge. LCC Br. 12. But the Court's holding that subsequent purchasers may pursue a takings claim is nothing more and nothing less than a holding that they have standing to do so. And the Court's reasoning by its own terms applies as much to facial claims as to as-applied claims.

The panel noted that *Carson Harbor Village* is inconsistent with *Palazzolo*, but found it unnecessary to decide the issue. *Guggenheim*, 582 F.3d at 1005-06. In *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184 (9th Cir. 2008), this Court similarly noted that *Carson Harbor Village*'s premise was "expressly rejected" by *Palazzolo*, but declined to overrule it. *Id.* at 1190 n.11. Now that the Court is sitting en banc, there is no reason to refrain from pronouncing the end of *Carson Harbor Village*. And there are strong reasons to do so. The uncertain status of *Carson Harbor Village* complicates the work of district courts and frustrates the efforts of plaintiffs to have valid claims heard. The en banc Court should accordingly overrule *Carson Harbor Village* and hold,

consistent with *Palazzolo*, that a landowner who purchases land after a regulation has taken effect has standing to bring a facial challenge to that regulation.

### B. The *Williamson County* Ripeness Test Does Not Apply To Facial Challenges And Is Prudential Only

Both the panel majority and the dissent agreed that the ripeness requirements set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), pose no bar to reaching the merits of this case, because the requirements are prudential, and prudential considerations favor entertaining plaintiffs' facial challenge. *See Guggenheim*, 582 F.3d at 1006-13; *id.* at 1035 (Kleinfeld, J., dissenting). The LCC nonetheless argues that *Williamson County* states a jurisdictional rule that requires these plaintiffs to pursue an inverse condemnation proceeding in state court before prosecuting their claims in federal court. LCC Br. 4-10. The argument should be rejected.

a. *Williamson County* was an as-applied challenge in which the Supreme Court announced two ripeness requirements for certain takings claims: First, plaintiffs should wait to file suit until the government "has reached a final decision regarding the application of the regulations to the property at issue" (the "final decision requirement"). 473 U.S. at 186. Second, and relevant here, a "claim that the application of government regulations effects a taking" is not ripe until the plaintiff has been denied "just compensation" by the state for his loss, unless state-

law procedures are "unavailable or inadequate" (the "state litigation requirement"). *Id*. at 194-95, 197.

A few years after *Williamson County*, however, the Supreme Court explained that *Williamson County*'s two ripeness requirements were not implicated by a "*facial* challenge" alleging that an ordinance did not "'substantially advance' a 'legitimate state interest' no matter how it [was] applied." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis in original). The Court explained that because such a challenge "does not depend on the extent to which [plaintiffs] are deprived of the economic use of their particular pieces of property or the extent to which these particular [plaintiffs] are compensated," it is ripe without first presenting it to the state." *Id.*

The Supreme Court has subsequently disapproved the "substantially advances" test for assessing takings claims. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). But it has not disturbed the holding in *Yee* that the *Williamson County* ripeness requirements do not apply to challenges that do not implicate the basis for those requirements.

The reasons for the *Williamson County* requirements are similarly inapplicable when, as here, a plaintiff claims that every application of the law constitutes a regulatory taking, and the law does not itself provide for compensation. In that context, the requirement that a plaintiff first demand just

compensation from a state court would make no sense. There can be no serious suggestion that a state intends to compensate all those affected by a given regulation when it enacts the law without providing for compensation. That is particularly true when, as here, the state proceeds to enforce the law, and resists the argument that compensation is required. To force a plaintiff to seek compensation in state court in such circumstances would be to insist upon pointless delay and unjustified frustration of a plaintiff's entitlement under 42 U.S.C. § 1983 to bring a takings claim in federal court without having to exhaust state remedies.

Consistent with *Yee*, the Supreme Court has repeatedly advised that facial challenges need not be assessed for ripeness under *Williamson County*. *See, e.g.*, *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 340 n.23, 345-46 (2005) (explaining that plaintiffs' facial "substantially advances" takings challenge could have been pursued in federal court notwithstanding the plaintiffs' failure to pursue just compensation in state court); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 & n.10 (1997) (facial challenges alleging that "mere enactment of the statute amounted to a taking" are "generally ripe the moment the challenged regulation or ordinance is passed"); *Lingle*, 544 U.S. 528 (exercising jurisdiction over facial "substantially advances" challenge that did not satisfy state litigation requirement).

Consistent with *Yee* and its progeny, other circuits have recognized facial takings challenges to be ripe regardless of whether the plaintiff has satisfied *Williamson County*'s final decision requirement or its state litigation requirement. *See Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) (facial challenges alleging the invalidity of a state regulation are not subject to "the state procedures requirement" (citing *San Remo* and *Lingle*)); *Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 14 (1st Cir. 2007) (holding that the plaintiff's "facial statutory [physical takings] challenge … need not be brought first to a Commonwealth body, either administrative or judicial" (citing *Suitum* and *Yee*)); *see also Kittay v. Giuliani*, 252 F.3d 645, 647 (2d Cir. 2001) (per curiam) (dismissing, without explanation, the as-applied challenge as unripe but deciding the facial regulatory taking challenge on the merits); *but see County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006) (holding that the final decision rule does not apply to a facial challenge but that a facial challenge "does not relieve [plaintiffs] from the duty to seek just compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated" (citing *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-06 (9th Cir. 1996))).

Panel decisions of this Court, however, have held that while facial challenges are exempt from *Williamson County*'s final decision rule, they still must satisfy its state litigation requirement. *See, e.g.*, *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) ("Facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation. The state remedies prong, however, does apply to facial challenges." (citation omitted)); *Sinclair Oil Corp.*, 96 F.3d at 407 (proposing that *Yee*'s statement that *Williamson County* is inapplicable to facial challenges applies only to "substantially advances" facial challenges, and not to "claims premised upon the denial of a property's economically viable use"). That gloss on the applicability of *Williamson County* does not follow from any Supreme Court decision, and fails to address the salient point that a state litigation requirement makes no sense when the State plainly does not intend to compensate every party affected by a regulation. The Court should therefore take this opportunity, sitting en banc, to hold that parties bringing facial challenges alleging a violation of the Takings Clause need not pursue a claim for just compensation in state court before pursuing a federal action.

b. Even assuming *Williamson County* applies to facial challenges, it is no bar here. As the panel concluded, the *Williamson County* ripeness test is prudential,

not jurisdictional, and prudential considerations weigh in favor of entertaining plaintiffs' takings claim. *Guggenheim*, 582 F.3d at 1007-13.

Since *Williamson County*, the Supreme Court has repeatedly stressed that the ripeness considerations described in that case are not rooted in Article III. For example, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court explained that *Williamson County* sets forth "two independent *prudential* hurdles to a regulatory taking claim brought against a state entity in federal court." *Id.* at 733-34 (emphasis added). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the availability of a state procedure for regaining use of land "goes only to the prudential 'ripeness' of [a] … challenge." *Id.* at 1013. And in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997), the Court concluded that it had jurisdiction over the case, even though plaintiffs had not completed the state litigation requirement.

The LCC argues that *Suitum* and *Lucas* hold only that the final decision requirement is prudential. The argument is meritless. In *Suitum*, the Court recognized that *both* requirements are prudential. *See* 520 U.S. at 734 & nn.7-8. And in *Lucas*, the state disputed its obligation to pay the plaintiff compensation on the ground of an unpursued state procedure, an objection that implicated both prongs of the *Williamson County* test. *See* 505 U.S. at 1010-13. Moreover, the LCC offers no answer to *International College of Surgeons*. There, the Court

expressly found jurisdiction even though the case had been removed to federal court before the plaintiff could obtain a determination of his claim for just compensation from the state. *See* 522 U.S. at 163. If not having a denial of compensation from the state in hand deprives a federal court of Article III jurisdiction, the Court could not and would not have exercised jurisdiction in that case.[3]

The LCC's insistence that *Williamson County* ripeness must be jurisdictional also cannot be reconciled with general ripeness principles. Ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Suitum*, 520 U.S. at 734 n.7 (quotation omitted). As this Court has explained, the constitutional component of the ripeness inquiry largely coincides with standing's "injury in fact" prong, *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1123 (9th Cir. 2009), and may be characterized as "standing on a timeline," *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The prudential inquiry, by contrast, focuses on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Colwell*, 558 F.3d

[3] The LCC relies on the Court's statement in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), that plaintiffs' as-applied challenges were not "properly before the District Court" before they were pursued in state court. *Id.* at 344; *see id.* at 345-47. But that is simply a restatement of *Williamson County*'s prudential ripeness requirement.

at 1124 (quotation omitted); *see Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2005). Where, as here, a takings plaintiff has alleged a direct economic injury on account of the regulatory action, the constitutional ripeness of the suit is as plain as the plaintiff's standing to bring it. *See Lucas*, 505 U.S. at 1012 n.13 (plaintiff has adequately alleged injury in fact where he claims damages flowing from the taking of his property).

Consistent with Supreme Court precedent, other courts of appeals have recognized that the *Williamson County* ripeness requirements are not jurisdictional. *See, e.g.*, *Flores Galarza*, 484 F.3d at 14 (holding that "the *Williamson County prudential* ripeness concerns are inapposite here" (emphasis added)); *Washlefske v. Winston*, 234 F.3d 179, 182 (4th Cir. 2000) ("Ripeness in this context does not refer to Article III's 'case or controversy' requirement, for that is plainly satisfied here…. Rather, the question is one of prudential ripeness—whether we *should* exercise federal jurisdiction." (emphasis in original)); *Forseth v. Village of Sussex*, 199 F.3d 363, 368 n.7 (7th Cir. 2000) (noting that the Supreme Court has "distinguished *Williamson*'s prudential ripeness requirements from ripeness requirements drawn from Article III limitations on judicial power"); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1300 n.20 (10th Cir. 2008) ("Where, as here, Willis asserts a 'genuine case or controversy,' ripeness implicates only prudential concerns."); *see also Yamagiwa v. City of Half Moon*

*Bay*, 523 F. Supp. 2d 1036, 1108 (N.D. Cal. 2007) ("[T]he court interprets the state procedures prong of *Williamson County* to have been drawn from prudential reasons for refusing to exercise jurisdiction…. Here, … prudence weighs in favor of retaining jurisdiction." (quotation omitted)).

Nevertheless, as the panel opinion acknowledged, the question has occasioned some confusion within this circuit. *See Guggenheim*, 582 F.3d at 1009-11; *see also McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (noting the confusion). Sitting en banc, this Court has the opportunity to clarify that *Williamson County*—if it applies in this case at all—imposes only prudential limitations. It should so hold.

Once *Williamson County*'s ripeness requirements are understood as a prudential rather than a jurisdictional requirement, there is no barrier to entertaining plaintiffs' suit. As the panel explained, it is not "prudent to apply [the] prudential requirement here"—the City forfeited a ripeness argument, and plaintiffs substantially complied with the state litigation requirement in any event. *See Guggenheim*, 582 F.3d at 1011-13. Because this is a facial challenge, the Court is in a position to fully consider the relevant issues without further state exposition. *See Yee*, 503 U.S. at 526-31; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500-02 (1987); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 776-77 (9th Cir. 2000). The

question whether the mobile home premium constitutes an impermissible transfer of wealth requires no further factual amplification. *Cf. Colwell*, 558 F.3d at 1128. And dismissing the case would work a substantial hardship on the parties, occasioning the unnecessary expenditure of time, money, and resources when it is already clear that plaintiffs are losing money on a daily basis on account of the regulation. *See Municipality of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992). At this stage in the legal proceedings, after years of litigation crystallizing the parties' respective arguments, no benefit would be gained from a detour through state court.

## CONCLUSION

For the foregoing reasons, the Court should hold that plaintiffs have standing to bring their takings claim, that the claim is ripe, and that the panel correctly concluded that the City's rent control ordinance constitutes a regulatory taking.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. RULE 32(a) AND NINTH CIRCUIT RULE 32-1**

I certify that the attached amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,005 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 and 14-point Times New Roman.

Dated: April 16, 2010

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 16, 2010, I electronically filed the foregoing **BRIEF OF MANUFACTURED HOUSING EDUCATIONAL TRUST, GOLDSTEIN PROPERTIES, INC., AND MORGAN PARTNERS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS** 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 one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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