No. 06-56306

IN THE

United States Court of Appeals for the Ninth Circuit

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, *and*

MAUREEN H. PIERCE,

Plaintiffs-Appellants,

v.

CITY OF GOLETA, ET AL.,

Defendants-Appellees.

Appeal From the United States District Court for the Central District of California
Florence-Marie Cooper, District Judge, Case No. CV 02-02478 FMC (RZx)

BRIEF OF *AMICI CURIAE* AMERICAN PLANNING ASSOCIATION, APA CALIFORNIA, CONSTITUTIONAL ACCOUNTABILITY CENTER, AND WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT REGARDING CONSENT TO FILE

Appellants and Appellees have given *amici* consent to file this brief, which is being filed consistent with the Court's April 21, 2010 order extending the deadline for filing *amicus* briefs to May 15, 2010.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that no party to this brief is a publicly-held corporation, issues stock or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

Constitutional Provisions and Legislative Materials

Law Review Articles

INTEREST OF THE AMICI CURIAE

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning—including physical, economic, and social planning—at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the well-being of people today, as well as future generations, by developing sustainable and healthy communities and environments. The organization has 47 regional chapters and 20 divisions devoted to specialized planning interests, and represents more than 44,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues.

APA California is the APA's largest chapter with 6,500 members. Its mission is to create great communities in California by providing vision and leadership that fosters better planning. APA and APACA believe this case is of particular significance because of its potentially chilling effect on the enactment of land use and development regulations, including those intended to protect affordable housing.

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. Building on the work of its predecessor organization, Community Rights Counsel, CAC has submitted *amicus curiae* briefs in the federal courts of appeals and the Supreme Court arguing against overly expansive readings of the Fifth Amendment's Taking Clause.

Western Center on Law and Poverty has fought for justice and system-wide change to secure housing, healthcare and a strong safety net for low-income Californians since 1967. Western Center engages in legislative advocacy, litigation and educational work, and has been prominently involved in maintaining protections for mobile-home residents and individuals in rent-controlled housing. Western Center advocates for the production and preservation of quality affordable housing and the reduction and prevention of homelessness by protecting and expanding tenants' rights.

SUMMARY OF ARGUMENT

By the panel majority's own account, the Supreme Court has never found a regulation to be facially unconstitutional under the *Penn Central* test. This is not all that surprising, for it is wholly appropriate for courts to exercise particular restraint in declaring regulatory takings, given that the text and history of the Fifth Amendment show that the Founders intended to limit only physical takings of property for public use without just compensation. Nonetheless, the panel in this case found a taking where 1) the rent control regulation had absolutely no effect on the wealth of the petitioners, 2) there are no reasonable investment-backed expectations to be protected, since the Guggenheims purchased their mobile-home park with the discount for the rent control ordinance incorporated into the price and could have had no reasonable expectation that the ordinance would be repealed, and 3) the character of the government action was merely a reenactment of a long-established ordinance, perhaps one of the most routine government actions a city can take. In short, the panel found a taking on a facial challenge, breaking new jurisprudential ground, under facts where such a result could hardly be more unjustified.

Courts have been considering the constitutionality of rent control ordinances under several different theories and across many years. Not a single court of which we are aware has found rent control to be a taking—without being overruled by the Supreme Court. It is nearly impossible to find a rent control statute unconstitutional on its face because, whatever one may think of rent control as an economic or policy matter, rent control statutes have written into them the possibility of a "just and reasonable return" on the rental property. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 165 (1976). Indeed, even if mobile-home park owners become dissatisfied with the profits they are able to make from their properties as a result of the rent control plan, they can apply for a rent increase that will take into account any past "confiscatory" rent control limitations. *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 783-85 (1997). The facial challenge to the City of Goleta's rent control ordinance thus does not even come close to meeting the Supreme Court's requirement that statutes may be found unconstitutional on their face only when "no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Nonetheless, the panel majority second-guessed the wisdom of the City's rent control ordinance for mobile-home owners. By using the *Penn Central* regulatory takings inquiry to focus on the purported "wealth transfer" from the mobile-home park owners to the park's tenants, the panel slipped considerations about the wisdom and efficacy of the government action back into takings analysis, despite the Supreme Court's confirmation in *Lingle v. Chevron U.S.A.* that such considerations have no place in takings analysis. This effort to subvert *Lingle* is improper and an incorrect application of *Penn Central*.

A faithful application of the Court's regulatory takings jurisprudence shows that the City of Goleta's 2002 reenactment of Santa Barbara County's rent control ordinance had no economic impact on the Guggenheims because they initially purchased the mobile-home park at a price that reflected the rent control law. Moreover, they have not shown—and could not show—any distinct, reasonable investment-backed expectations that were disturbed by the continuation of the rent control regime under which they originally invested in their mobile-home park. As the panel conceded, Slip Op. at 13855, the Guggenheims "got exactly what they bargained for when they purchased the Park—a

mobile-home park subject to a detailed rent control ordinance." And as Judge Kleinfeld rightly concluded, *id.* at 13881, "[t]he City took nothing from what they bought."

ARGUMENT

I. THE GUGGENHEIMS' CLAIM FAILS TO MEET THE *SALERNO* STANDARD FOR FACIAL CONSTITUTIONAL CHALLENGES.

The panel majority, and the plaintiffs, acknowledged that this case presents only a facial challenge to the City of Goleta's rent control ordinance. *See* Slip Op. at 13836. Accordingly, the Guggenheims must meet the strict *Salerno* standard in order to prevail in their constitutional challenge. *See Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc) (explaining that the *Salerno* standard applies to all facial challenges outside the First Amendment context).[1] The Supreme Court held in *United States v. Salerno*, 481 U.S. 739, 745 (1987), that a statute or regulation will be found to be unconstitutional on its face only when the challenger demonstrates that "no set of cir-

[1] The *Salerno* standard is subject to limited exceptions for First Amendment overbreadth challenges and challenges to statutes that restrict the availability of abortion. *See Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1026-27 (9th Cir. 1999). Neither exception is relevant here.

cumstances exists under which the [a]ct would be valid." This Court has explained that "a generally applicable statute is not facially invalid unless the statute 'can *never* be applied in a constitutional manner.'" *United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) (emphasis in original) (quoting *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir. 2008)). Stated simply, the *Salerno* test requires that the challenged legislation be unconstitutional in *all* its potential applications.

The Guggenheims cannot meet this burden. As a threshold matter, there are provisions of the challenged rent control ordinance that allow for discretionary rent increases that could moderate any potential economic impact on a mobile-home park owner. RCO § 11A-5(h), *reproduced in* Petition, Ex. 13. Because the rent control regulation does not dictate the result of such an application, it is virtually impossible for a park owner to prove that the regulation, *on its face,* effects a taking.

In addition to the automatic annual rent increase it allows, the ordinance authorizes "an increase in excess of the automatic increase for increased costs where increases in expenses and expenditures of management justify such increase." RCO § 11A-5(h), *reproduced in* Petition, Ex. 13. This discretionary rent increase provides an opportunity

for a park owner to obtain rent increases reflecting a variety of factors. *Id.* § 11A-5(i). The Guggenheims have not shown that, in *all* cases, such a rent increase would fail to prevent a taking.

Moreover, under *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997), a park owner may seek a prospective rent increase to ameliorate the prior economic impact of a rent control regime and thereby avoid any constitutional injury. The California Supreme Court's decision in *Kavanau* provides that a property owner subject to rent control may seek permission for a rent increase that reflects the landlord's costs, including the "cost" of any past "confiscatory" rent ceilings. *Id.* at 783-85. There is sufficient leeway in the City's rent control ordinance to make a *Kavanau* increase available to a park owner in Goleta: Subdivision (i)(3) of section 11A-5 provides for an increase in "an amount to cover operating costs, if any, in excess of one-half of the automatic increase. The arbitrator shall have discretion to add such amounts as are justified by the evidence and otherwise permitted by this chapter." A park owner (whether the Guggenheims or someone else) can apply for a rent increase that would increase the park owner's profit based on the purported stifling of rental profits. Accordingly,

even assuming the market environment the Guggenheims suggest, a *Kavanau* adjustment could result in an application of the rent control ordinance that does not constitute a taking because it moderates the economic impact of any "confiscatory" rent control policies by adjusting future rental rates. Thus, the *Salerno* standard for facial challenges cannot be met in this case.

Even putting aside the possibility of a *Kavanau* increase, the Guggenheims' facial challenge to the City's rent control ordinance cannot prevail. In facial takings claims, this Court has explained that a reviewing court should "look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) (internal quotation marks and citation omitted). The inquiry is thus limited to whether the "mere enactment"—or reenactment, in this case—of the challenged regulation amounts to a taking. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (recognizing the "important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact

of government action on a specific piece of property requires the payment of just compensation").

As Judge Kleinfeld's dissent in this case so concisely and clearly demonstrated, the City's re-adoption of the mobile-home rent control ordinance did not "transfer wealth" from the plaintiffs—because it was simply a re-adoption of the County ordinance in place at the time they bought the park for a price reflecting the rent control law—and "reenactment had no economic impact on the Guggenheims." Slip Op. at 13880. Because the "mere" reenactment in 2002 of the County's rent control ordinance upon the City's incorporation had absolutely no effect on the Guggenheims whatsoever—and thus presents in and of itself a set of circumstances in which the application of the statute is not unconstitutional—the Guggenheims' facial constitutional challenge must fail.

II. THE PANEL'S APPLICATION OF *PENN CENTRAL* IS CONTRARY TO CONSTITUTIONAL TEXT AND HISTORY, AS WELL AS SUPREME COURT PRECEDENT.

From the very beginnings of the Takings Clause of the Fifth Amendment, which guarantees that "private property" shall not "be taken for public use, without just compensation," U.S. CONST. amend. V,

regulation of property was accepted as compatible with the Amendment's mandate. *See* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U.L. Rev. 1099, 1100 (2000) ("American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights."). Indeed, as Justice Scalia explained in *Lucas v. South Carolina Coastal Council*, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." 505 U.S. 1003, 1028 n.15 (1992).

When the Supreme Court eventually recognized that regulations could rise to the level of a taking, it was careful to limit the regulatory takings doctrine to instances in which the effect of a regulation was tantamount to the direct appropriation of property contemplated in the text of the Fifth Amendment. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Supreme Court has made clear that the doctrine of regulatory takings is narrow, and that the Takings Clause serves only as a mere "outer limit" on the ability of government to prevent harmful land uses and implement other community protections. *Dolan v. City of*

Tigard, 512 U.S. 374, 396 (1994); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (to succeed in a regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain"). As these precedents make clear, regulatory takings doctrine is not license to second-guess local government policymakers on the wisdom or efficacy of regulations.

The panel majority tossed aside these careful limitations and, in a case in which it could not have been more unwarranted, broke new jurisprudential ground to find Goleta's mobile-home park rent control regulation facially unconstitutional. This unprecedented approach is at odds with the restraint that characterizes the Supreme Court's limited extension of the Takings Clause to regulatory takings, and contrary to precedent.

A. Because the Fifth Amendment Was Drafted to Apply Only to Physical Takings of Property, the Supreme Court Has Carefully Limited Constitutional Liability for Regulatory Takings.

For most of its history, the Takings Clause has "been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 551 (1871). As explained by the Supreme Court in *Tahoe-Sierra*:

> [The Takings Clause's] plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.[2]

Prior to the Court's ruling in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). Thus, even when the Court extended takings jurisprudence to include regulatory takings, it emphasized that

[2] 535 U.S. at 321-22.

a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985).

In addition to these textual reasons, there is also a functional justification for limiting regulatory takings. In *Mahon* itself, the Court stressed that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U.S. at 413. The Supreme Court has also emphasized that the adjustment of property rights for the public good "often * * * curtails some potential for the use or economic exploitation of private property," but to require compensation for such adjustments would improperly "compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

To determine when regulations rise to the level of a taking, the Supreme Court has relied upon a balancing of three factors: the economic impact of the regulation, the extent to which the regulation interferes with "distinct, investment-backed expectations," and the character of the government action. *Penn Cent. Transp. Co. v. New York City*, 438

U.S. 104, 124 (1978). Under *Penn Central*'s balancing test, no one factor is determinative, *id.* at 130-31 & n.27, and significant diminutions in property value are generally permissible without compensation.[3] Under a correct—and appropriately restrained—application of *Penn Central*, it is clear that the City's rent control ordinance does not effect a taking and that the panel majority erred.

First, as Judge Kleinfeld's dissent so ably demonstrated, the 2002 reenactment of the rent control ordinance had absolutely no economic impact on the Guggenheims. While the majority asserts that mobile-home rent control ordinances like Goleta's "cause[] a wealth transfer from the mobile home park owners to the incumbent mobile home tenants," Slip Op. at 13846, even if true, this "wealth transfer" would have occurred when the rent control plan was first enacted in the 1970s,

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[3] *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 US. 365, 384 (1926) (permitting 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (permitting 92.5% diminution in value from $800,000 to $60,000); *see also Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645 (1993) (citing *Euclid* and *Hadacheck* with approval and rejecting a takings claim based on allegations that an employer's "withdrawal liability" from a multi-employer pension plan required payments of "46% of shareholder equity," on the ground that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

long before the Guggenheims purchased the mobile-home park in 1997. The park owners and tenants in the 1970s may have felt the impact of this wealth transfer, but since that time each party has invested against the backdrop of rent control: the Guggenheims purchased the park for a price that incorporated the lower profits they might be able to realize with the rent control limitations, and subsequent mobile-home tenants have paid a greater sum for their homes based on the protection provided by the rent control ordinance. While the Guggenheims would surely have liked to have achieved greater profits on their property, they got exactly what they bargained for.

Similarly, the reenactment of the rent control ordinance in 2002 did not interfere with any "distinct, investment-backed expectations" that the Guggenheims could reasonably have had: their investment *included* the expectation that the rent control ordinance would remain in effect, otherwise the park would have been priced differently. While the Guggenheims might have harbored a wish that the City would repeal rent control or stop enforcing it, such hopes are hardly "distinct, investment-backed expectations."

Finally, the "character of the government action" prong is fairly straightforward in this case. The 2002 reenactment of the rent control ordinance was nothing more than a continuation of the exact same policies that were in effect for decades, including when the Guggenheims purchased their mobile-home park. There was no shifting of burdens, no transfer of wealth. The action taken in 2002 was simply an affirmation of the status quo for mobile-home park owners and tenants in Goleta. As Judge Kleinfeld correctly concluded, "continuation of the ordinance deprives no one, not the plaintiffs and not the tenants, of any compensable value." Slip Op. at 13882.

B. The Panel Ruling Distorted the Court's Regulatory Takings Precedent To Second-Guess Rent Control Policy Choices That Are Reserved to State and Local Governments and Threatens to Disrupt Routine Governmental Activities.

The panel majority sidestepped much of the substance of a *Penn Central* analysis to focus instead on the purported flaws of mobile-home rent control. Judge Bybee's opinion for the panel in this case repeatedly criticized the wisdom of the City's rent control policy. *See, e.g.*, Slip Op. at 13847-48, 13850-51, 13865-66. However, the Takings Clause does not give judges free rein to second-guess state and local governments

and discard policies they dislike. The Supreme Court in *Lingle v. Chevron*—a case involving rent control limits on Hawaii gas stations—unequivocally rejected a takings analysis that would have empowered courts "to scrutinize the efficacy of a vast array of state and federal regulations" and "substitute their predictive judgments for those of elected legislatures and expert agencies." *Lingle*, 544 U.S. at 544.

Not only is such policy-making "a task for which courts are not well suited," *id.*, but the panel majority's approach to takings claims threatens to disrupt the vital functioning of our state and local governments. The panel decision re-opened a longstanding rent control plan based on nothing more than a routine reenactment that is required as a matter of course when cities incorporate. *See* Cal. Gov't Code § 57376 (2008). The required re-adoption of an ordinance identical in substance to the rent control ordinance in place when the Guggenheims purchased their mobile-home park does not somehow erase the fact that the Guggenheims had no reasonable, investment-backed expectation that the rent control ordinance would ever cease to be in effect. If a momentary, purely formal "gap in time," Slip Op. at 13815 n.2, during which a regulation is ostensibly not in effect—for example, when cities incorporate or

when statutory sections are renumbered—can allow longstanding laws to be challenged with lawsuits as flimsy as the Guggenheims', then local governments will have difficulty carrying out vital governmental functions.

The Supreme Court has clarified that judges should not analyze a takings claim based on whether an ordinance "substantially advance[s] legitimate state interests." *Lingle*, 544 U.S. at 540 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). As the Court explained in *Lingle*, "the 'substantially advances' formula suggests a means-end test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Id.* at 542. The Court stated clearly that such a means-end test "has no proper place in our takings jurisprudence." *Id.* at 540. The attempts by the Guggenheims and their *amici* to revive the "substantially advances" test by turning the *Penn Central* factors into an inquiry on the worthiness of a particular government action should be squarely rejected.

III. THE GUGGENHEIMS' CASE IS CLEARLY DISTINGUISHABLE FROM *PALAZZOLO*.

The panel majority incorrectly applied *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), to find that the Guggenheims could bring a claim that had long since expired. This case is easily distinguishable from *Palazzolo* on both the facts and the law.

As a threshold matter, Anthony Palazzolo was an owner of the property at the time the property was first burdened by the challenged regulations, albeit in a different legal form. The property was first purchased by Shore Gardens Inc., of which Palazzolo became the sole shareholder; when the corporation's charter was revoked for nonpayment of taxes, the title of the property passed, by operation of law, to Palazzolo as the sole shareholder. *Id.* at 613-14. The question thus was whether the transfer of legal title from a corporation of which Palazzolo was the sole shareholder to Palazzolo himself extinguished any claim that could have been brought by the original titleholder. *Id.* at 626-29. The Court held that, under the facts of that case, Palazzolo's takings claim was not extinguished; obtaining title after the enactment of the challenged regulation was not a *per se* bar to a takings claim. *Id.* at 628. That said, Justice O'Connor's concurrence made clear that *Pa-*

lazzolo's "holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis….it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." 533 U.S. at 633 (O'Connor, J., concurring). Here, the Guggenheims purchased the park long after the statute of limitations had run for a takings challenge to the County's rent control ordinance, which was re-adopted in 2002 by the City. The mere act of purchasing a property subject to rent control cannot serve to eviscerate clear statutes of limitation; if it could, any regulation affecting property—including zoning, rent control, and even technical provisions such as drainage requirements—would be open to challenge every time a covered property changed owners. *Cf. Daniel v. County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002) (finding a takings claim time-barred when a plaintiff purchased property that was already subject to the challenged restriction).

In addition, *Palazzolo* involved a land transfer, not a purchase, so there was no discount based on the regulatory regime that could be reflected in the price. Thus, the economic impact on Palazzolo was com-

pletely different from the economic impact on the Guggenheims, who purchased the mobile-home park under market conditions that included a discount based on reduced rental profits from rent control. Justice O'Connor's concurrence in *Palazzolo* emphasized that, in a *Penn Central* analysis, "[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred." *Id.* at 635-36 (O'Connor, J., concurring). Here, unlike in *Palazzolo*, the fact that the rent control system had long been in place when the Guggenheims purchased the park was incorporated into the price they paid for the property.

Finally, in *Palazzolo*, the wetlands protection regime in Rhode Island got stricter over time—evolving from a program under which a landowner could generally expect a development permit to a program in which permits were difficult to obtain. As a result, Palazzolo could fairly claim that his investment-backed expectations had been upset by the State's permit denial. *See id.* at 633 (O'Connor, J., concurring) (noting that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [investment-backed] expectations"). Here, the Guggenheims knew full well the limi-

tations the rent control plan placed on their investment return, which did not change at all when the ordinance was reenacted in 2002.

Any takings claim against the rent control system that the Guggenheims might reasonably have hoped to have was time-barred when they purchased the park in 1997. Regardless of whether the plaintiffs, or the judges on the panel, would prefer to address the wisdom or efficacy of this rent control plan, takings law simply does not allow it.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the ruling of the District Court.

Respectfully submitted,

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Dated: May 15, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,438 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Century Schoolbook font.

Executed this 15th day of May, 2010.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for amici curiae American Planning Association, APA California, Constitutional Accountability Center, and Western Center on Law & Poverty

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2010.

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

Executed this 15th day of May, 2010.

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