No. 10-1125

IN THE

Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA, a Municipal Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BRANDON SIMMONS
HOGAN LOVELL US LLP
555 Thirteenth St., NW
Washington, D.C. 20004
(202) 637-5600
brandon.simmons@hoganlovells.com

ILYA SHAPIRO
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

April 13, 2011

QUESTION PRESENTED

Does the Takings Clause have an expiration date?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Page(s)

Constitutional Provisions:

Other Authorities:

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

A divided Ninth Circuit *en banc* panel found that Daniel Guggenheim and other plaintiffs here (collectively "Guggenheim") could not prevail on their claim that the City of Goleta's rent control ordinance violates the Fifth Amendment's Takings Clause because they had purchased their mobile home park after the ordinance was enacted. *Guggenheim v. City of Goleta*, 2010 U.S. App. LEXIS 25981 (9th Cir. Dec. 22, 2010). Instead of applying the rule of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held it improper to bar a takings claim simply because the property at issue was transferred after a regulation's enactment, the court limited *Palazzolo*'s precedential authority to specific factual and procedural settings. *See Guggenheim*, No. 06-56306, 2010 U.S. App. LEXIS, at *18. Such a ruling amounts to an abrogation of *Palazzolo*.

In *Palazzolo*, the Supreme Court laid out the important principle that "a regulation that otherwise would be unconstitutional absent compensation is not transformed [into one that passes muster] by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629. The idea that "the postenactment transfer of title would absolve the State of its obligation to

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief, and have consented to its filing in letters on file with the Clerk's office.

defend any action restricting land use, no matter how extreme or unreasonable" was rejected by the Supreme Court as a rule that would "put an expiration date on the Takings Clause." *Id.* at 627. The Ninth Circuit decision cannot be reconciled with *Palazzolo* because it enforces such an expiration date.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus curiae* briefs with the courts. This case is of central concern to Cato because it implicates Fifth Amendment protections from regulatory takings and is a departure from foundational Supreme Court decisions protecting those rights.

STATEMENT OF THE CASE

In 1997, Guggenheim bought a mobile home park in what at the time was an unincorporated part of Santa Barbara County and subject to the County's rent control ordinance. In 2002, the City of Goleta incorporated and the park fell within the city's jurisdiction. At the time of incorporation, Goleta adopted the County's laws, including the rent control ordinance. *Guggenheim v. City of Goleta*, 582 F.3d 996, 100 (9th Cir. 2009).

One month after Goleta incorporated, Guggenheim brought a facial challenge to the ordinance claiming violations of the Takings Clause and other constitutional protections. *Id.* at 1002. After some litigation in both the federal district court

and state court, the district court issued summary judgment in favor of Goleta in 2006. *Id.* at 1002-4.

A Ninth Circuit panel reversed, finding that in light of *Palazzolo,* Guggenheim, who purchased the property subject to regulation, could still bring a regulatory takings challenge. *Id.* at 1005-6. The court admitted that it was unclear how the investment-backed expectations would be calculated in the context of the post-enactment purchase. *Id.* at 1026 ("We read *Palazzolo* to mean that even though the Park Owners purchased the Park in a regulated state similar to the one imposed by the City, the Park Owners may still prevail under *Penn Central.* How we are to apply *Penn Central* post-*Palazzolo*, is less clear."); *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978) ("The Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *Lingle v. Chevron*, 544 U.S. 528 (2005) ("regulatory takings challenges are governed by *Penn Central* . . . . *Penn Central* identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking."). But it emphasized that Guggenheim's post-enactment purchase was not in itself fatal to his challenge and that the case should proceed for a determination of Guggenheim's just compensation, if any was deserved. *Id.* at 1005-6. The panel remanded to the

district court for further proceedings in that regard. *Id.* at 1034.

But that was not the end of the Ninth Circuit's consideration of this case. After rehearing, a divided *en banc* panel reversed the three-judge panel. Focusing on the temporal ordering of the enactment and purchase as well as procedural distinctions between *Palazzolo* and this case, the *en banc* court significantly narrowed *Palazzolo*'s effect. *Guggenheim*, 2010 U.S. App. LEXIS, at *17-29.

REASON FOR GRANTING THE PETITION

This Court should provide much-needed doctrinal certainty by reaffirming *Palazzolo.* It is apparent that the courts of appeal need clarity on whether *Palazzolo* has binding force: this is one of two recent cases where courts of appeal have read *Palazzolo* so narrowly as nearly to read it out of takings jurisprudence. The other case, *CRV Enterprises v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), also has a pending Petition of Certiorari. Guggenheim's petition raises a question that is central to property rights jurisprudence: Does the Takings Clause have an expiration date?

ARGUMENT

I. THIS CASE IS CRITICALLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS.

This case presents several significant issues. The court should consider the following: (1) a rule that allows the transfer of title to immunize government

regulation from constitutional or other legal challenge expands government power and diminishes property rights; (2) in dissent, Judge Carlos Bea, joined by Chief Judge Alex Kozinski and Judge Sandra Ikuta, decried that the Ninth Circuit's *en banc* decision "flouts the Supreme Court's holding in *Palazzolo*"; and (3) this case—as well as *CRV Enterprises*—indicates the need for the Supreme Court to settle the spreading confusion about *Palazzolo*. We begin by explaining why the Court should underscore its disapproval of a rule that would deny subsequent owners the fundamental right to challenge government interference with property ownership.

A. The Ninth Circuit Placed an Expiration Date on the Takings Clause: the Date the Property Changes Hands.

The Fifth Amendment's Takings Clause conditions the taking of private property for public use on the government's provision of just compensation to the affected property owner. U.S. CONST. AMEND. V; *Kelo v. New London*, 545 U.S. 469, 477 (2005). Because courts rarely side against the government in its exercise of eminent domain—"the despotic power"—it is all the more important that owners be properly compensated for the appropriated property. *See generally Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Hawaiian Housing Authority v. Midkiff,* 467 U.S. 229, 243-44 (1984) ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be

put into use for the general public."); *Berman v. Parker,* 348 U.S. 26 (1954).

The most tangible example of a taking occurs when the government transfers ownership of land from one party to another—either directly to the government or to a private party who will use the land for a legitimate public purpose. *Kelo*, 545 U.S. at 478. Physical takings involve either the physical occupation or destruction of the property. *See e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Under certain circumstances, the Takings Clause allows a landowner to challenge the government even when it does not physically occupy or destroy the property, but instead diminishes the property's value through regulation. Under this Court's regulatory takings jurisprudence, the government must compensate a plaintiff for the diminution in property value caused by a regulation "so unreasonable or onerous as to compel compensation." *Palazzolo*, 533 U.S. at 627; *see also*, *e.g.*, *Lucas v. S.C. Coastal Counsel*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 625, 833 n.2 (1987) ("Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the

lot."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (compensable taking can occur not only when the government seizes or physically intrudes on land, but also when it enacts a "regulation [that] goes too far" in diminishing its value); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1872) ("There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

This Court has not accepted the view that those who purchase property after a regulation is enacted are, in effect, "on notice" and should be ineligible for compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 860 (Brennan, J., dissenting). Instead, faced with a claim from a property owner who purchased land already subject to strict California coastal land use laws, the Court held that just as such a regulation could be challenged by owners at the time of implementation, later owners may also challenge and be compensated. *Id.* at 833 n.2. The Court has made clear that prior owners' full property rights—including the right to challenge an overly burdensome regulation—transfer with title to the property. *Id. See also Palazzolo*, 533 U.S. at 628 ("It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

In *Palazzolo,* this Court explicitly rejected the rule that appellants like Guggenheim—those who purchased property already subject to a regulation—could *per se* have no investment-backed expectations

beyond what was allowed by the regulation, no matter how burdensome. This Court further explained that such a rule:

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627.

In the face of well-settled precedent protecting an individual owner's enduring right to challenge an overly burdensome regulation, the Ninth Circuit's *en banc* decision distinguished these rules, narrowed them significantly, and held that a post-enactment transfer of title eliminates subsequent owners' right to challenge a regulation. *See generally Guggenheim*, 2010 U.S. App. LEXIS, at *17-29. This holding is inconsistent with this Court's precedent, threatens fundamental rights, and should be reexamined.

B. The Ninth Circuit Decision Threatens to Disrupt Real Estate Markets Because Buyers and Sellers Will Know That a Transaction Would Extinguish the Right to a Takings Clause Challenge, Effectively Immunizing Government Regulation from Suit on That Basis.

A rule that causes property rights to change as property changes hands would be disruptive to real estate markets. If one property owner has the right to defend his property against laws enacted during his ownership, his property value will include the

assumption that if an overly burdensome law is enacted, he may successfully challenge the law and either overturn it or be compensated for diminished property value. But all of this is in doubt if he considers selling the property. As a buyer considers purchasing the property, she must look at any regulation, no matter how burdensome, and assume that if she takes title, she cannot challenge it. This deflates her estimate of the property's value. If the owner has a higher subjective value of the property than any potential buyer, this could interfere with the free exchange of real property.

Briefs from *Palazzolo* made these same arguments. An amicus brief on behalf of the petitioner explained that small business owners would suffer in a legal regime *sans Palazzolo*, but large developers with "high-powered legal counsel" would not, as they "might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed." Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner at 9, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). The "post-enactment purchaser" theory would invite litigation over the "form of the transaction, the nature of the transfers, and the effect of partial transfers" in that sophisticated buyers and sellers could circumvent the rule through, for example, acquisition by stock purchase. *Id.* at 10.

Individuals and small companies would not have the resources or expertise to protect their investment and development rights, creating a "massive uncompensated taking" from small developers and

investors that would preserve and enhance the rights of large corporations. *Id.* Such a rule would not only lead to litigation, but would stimulate "sprawl" and "premature" or "leapfrogged development." *Id.* at 15, 19. It would also restrain alienation by having the perverse effect of disincentivizing sellers because a seller unwilling to secure development rights would have to sell at a "stern discount" to cover the purchaser's loss of rights. *Id.* at 13-14.

Another brief from *Palazzolo* by the Institute for Justice and Professor Richard Epstein underscores this last point, explaining that the "disregard from the privity rule creates weird incentives that disrupt the sound operation of the real estate market" because if the buyer and seller are aware of the legal situation, "they may postpone an otherwise beneficial transfer in order to protect [the seller's ability to perfect title]," at a social loss presuming the buyer values the land over the seller. Brief of the Institute for Justice as Amici Curiae in Support of Petitioner at 7 n.2, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047).

Buyers may forgo a socially beneficial transaction for fear that the land will become worthless upon transfer of title. Thus, valuable voluntary transactions will be discouraged by an "unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state." *Id.* at 8. That will instead incentivize idle and unproductive uses of land. Finally, the Institute for Justice and Professor Epstein point to what they call a "knowledge problem": the buyer has "the best information on the adverse effects that the regulation has on his proposed plans for development" but this rule allocates the takings claim to the seller and

former owner who has "no knowledge of the particulars of the dispute, no ongoing interest in the property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens." *Id.* at 10. Both of these *Palazzolo amici* urge that the rule would disrupt real estate and invite a "torrent of lawsuits . . . ." *Id.* at 16.

The negative effects of the decision below on the real estate market and transaction-related litigation could be considerable.

II. THE NINTH CIRCUIT IS ADVANCING A MISAPPLICATION OF *PALAZZOLO* WHILE ALSO DEEPENING A CIRCUIT SPLIT.

The Petitioners recounted the sad *Palazzolo* saga, on which we elaborate here to show how similar facts produced a different result. *Palazzolo* involved plans to develop a piece of waterfront property in Westerly, Rhode Island. 533 U.S. at 611. In 1959, a corporation that would eventually be controlled by petitioner alone purchased three undeveloped parcels of coastal land. The corporation made several attempts to gain approval to develop the property between 1962 and 1966, including submitting applications to state agencies. These applications included requests for permits to fill in substantial portions of the parcel because its unstable, marshy ground was not fit for construction—but they were denied or otherwise not approved. *Id.* at 614. In 1971, the state passed legislation creating a Council charged with protecting coastal property. The Council promulgated regulations designating salt marshes such as those on the corporation's property protected coastal wetlands. *Id.*

Some time after the corporation's thwarted attempt to secure development permits, the corporation failed to pay its income taxes, and its charter was revoked. Pursuant to state law, title to the corporation's property—the newly protected coastal wetland parcels—passed to petitioner, the corporation's sole shareholder. *Id.* In 1983, petitioner, now owner of the property rather than shareholder in the property's corporate owner, renewed efforts to develop the land. Petitioner filed several applications for development permits, but failed on each one. The Council's regulations required that a landowner wishing to fill salt marsh lands be granted a special exception, and the Council proved unwilling to grant petitioner such an exception. *Id.* at 615. After having his attempts to secure permitting frustrated by the Council, petitioner filed suit claiming that the Rhode Island environmental law amounted to an inverse condemnation as applied to his property. The state trial court ruled against petitioner, and he appealed to the Rhode Island Supreme Court. *Id.*

The Rhode Island Supreme Court affirmed the state trial court in relevant part because petitioner had no standing to challenge the regulations predating his acquisition of the property. *Id.* at 616; *Palazzolo v. State*, 746 A.2d 707, 716-17 (R.I. 2000) ("[In 1978], there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision . . . Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case."). The state supreme court's decision in

Palazzolo is particularly germane to the instant case because its flawed reasoning—later overturned by this Court—mirrors the Ninth Circuit's here.

This Court frowned on the Rhode Island Supreme Court's view that "postregulation acquisition was fatal to the claim for depravation of all economic use and to the *Penn Central* claims." *Palazzolo,* 533 U.S. at 626; *Palazzolo v. State*, 746 A.2d at 716-17. These two rules, the Court explained, "amount to a single, sweeping, rule: A purchaser or successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626. In dispatching the reasoning now embraced by the Ninth Circuit, the Court explained:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or

> onerous as to compel compensation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

A. Other Circuits Have Recognized and Applied *Palazzolo.*

In addition to the cases and courts discussed by the Petitioners, at least two other circuit court cases from the past decade faithfully applied *Palazzolo*.

The First Circuit positively cited *Palazzolo* in a trade secrets claim for the premise that under *Penn Central*, "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations." *Phillip Morris v. Reilly*, 312 F.3d 24, 37 (1st Cir. 2002).

The Seventh Circuit also expressed support for *Palazzolo*'s rule in *Abbott Labs v. CVS Pharm., Inc.,* 290 F.3d 854, 860 (7th Cir. 2002), citing *Palazzolo* for the proposition that "a takings claim survives transfer of the property to a new owner." Indeed in *Abbott Labs*, Judge Frank Easterbrook expressed confusion as to why this rule was not self-evident. *Id.*

Both of these circuits unambiguously hold that *Palazzolo* forecloses the "post-enactment" theory.

B. The Ninth Circuit Had Abrogated *Palazzolo* Even Before the Instant Case.

Palazzolo cannot be reconciled with the Ninth Circuit's decision here. The Ninth Circuit explained that because the rent control ordinance was "a matter of public record, the price [Guggenheim] paid for the mobile home park doubtless reflected the burden of the rent control [he] would have to suffer." *Guggenheim*, 2010 U.S. App. LEXIS, at *23. And further implying that timing is dispositive, the Ninth Circuit opined that "[w]hatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in the Guggenheims' chain of title." *Id.* at *27.

How does the Ninth Circuit arrive at a decision that so contravenes this Court's holding in *Palazzolo*? As Judge Bea explains in dissent to the *en banc* opinion, the court relied on two illusory distinctions. First, Judge Bea notes the majority's focus on the distinction between an as-applied challenge and a facial challenge in the regulatory takings context:

> Why should the investment-backed expectations of a land owner bringing a facial challenge be analyzed differently from those of an as-applied claimant? If the *expectations* are valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations or they aren't.

Id. at *49 (Bea, J., dissenting).

Second, Judge Bea explains that the majority's distinction between *Palazzolo*, where the post-enactment owner acquired ownership by operation of

law, and this case, where Guggenheim acquired ownership through an open market purchase, is another distinction without legal significance. *Id.* at 48-49 ("These 'distinctions' are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California."). Judge Bea is correct to recognize that these distinctions should not absolve the Ninth Circuit of its obligation to follow *Palazzolo*.

But *Guggenheim* is not an aberration for the Ninth Circuit. Two years earlier, the Ninth Circuit acknowledged that one of its related decisions might be inconsistent with *Palazzolo* but declined to decide whether the law of the circuit was overruled on the grounds that such a ruling was not necessary for the decision. *See Equity Lifestyle Props., Inc., v. County of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008) (citing *Palazzolo*, 533 U.S. at 630). The Ninth Circuit effectively ignored *Palazzolo* by declining to decide whether *Palazzolo* overruled the case of *Carson Harbor*, where it had decided that the subsequent purchaser "has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property." *Carson Harbor Village, Ltd. v. City of Carson* 37 F.3d 468, 476 (9th Cir. 1991). The Ninth Circuit recognized that *Carson Harbor* was at odds with *Palazzolo*, where the Court stated that "where the State actor could not have deprived the prior owners of the property right at stake 'the prior owners must be understood to have transferred their full property rights in conveying the lot.'" *Palazzolo*, 533 U.S. at 629; *Equity Lifestyle Props*., 548 F.3d at 1190.

The Ninth Circuit has so significantly limited *Palazzolo*'s reach as to revert back to the pre-

Palazzolo uncertainty regarding whether a post-enactment purchaser may challenge a regulation burdening his property. Both the *Palazzolo* majority and Justice Sandra Day O'Connor in concurrence were clear that notice of the regulation cannot be sufficient to defeat a takings claim—and yet the Ninth Circuit decision in this case says just that. *See* John A. Kupiec, *Note: Returning to the Principles of "Fairness and Justice:" The Role of Investment-Backed Expectations in Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 886 (2008) (explaining that in *Palazzolo*, the Supreme Court rejected the idea that notice of a regulation can alone be fatal to a takings claim and noting that Justice O'Connor's concurrence suggests that although the Court will not deny compensation solely on notice, it will consider the prior existence of a regulation when conducting the factual inquiry into the regulation's inherent fairness and the plaintiff's expectations); *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central* . . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.'"). *Palazzolo* put to rest "once and for all the notion that title to property is altered when it changes hands." James S. Burling, *Private Property Rights and the Environment after* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). This Court should not let the Ninth Circuit disturb that finality.

C. The Federal Circuit Also Recently Contradicted *Palazzolo*.

While, as the Petitioners note, the Federal Circuit is one of the courts to have ruled opposite the Ninth Circuit, *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), that court also recently issued an opinion that is inconsistent with *Palazzolo*: *CRV Enterprises*, 626 F.3d at 1241. *Amicus* will also be submitting an *amicus curiae* brief supporting the petition for writ of certiorari in that case, which involves a complex procedural background but similarly disregards *Palazzolo*.

CRV Enterprises concerns a strip of navigable water—a "slough"—near an Environmental Protection Agency Superfund Site in Stockton, California. Between 1942 and 1990, a wood-preserving plant operated at the southern shore of the slough, across from property later purchased by CRV. Wood preserving releases hazardous chemicals, and during the plant's period of operations, it released significant quantities of such chemicals into the soil. Some of this contaminated soil settled to the bottom of the slough. In 1992, the EPA designated the site a Superfund National Priority. From 1992 to 1999, the EPA studied the Superfund site and its surroundings, and in March 1999 it issued findings. The findings—issued as a Record of Decision—called for the slough to have at least two feet of sand added to its bottom to cap contaminated sediment and for various restrictions to be placed on access to it. Despite these findings, no action was taken for some years thereafter. *Id.* at 1244.

In 2000, CRV arranged to purchase a tract of land bordering the slough and across from the Superfund

Site to build a marina, boat slips, storage facilities, and sales and service outlets. CRV was aware of the EPA's remediation plans, including its plan to restrict access to the slough and cap it to contain the contaminated sediment. In spite of the ongoing concerns about the EPA's planned action, CRV finalized its purchase of the site in 2002. *Id.* at 1245.

In 2006, seven years after the EPA issued its findings calling for remediation of the site, the EPA finally placed a log boom across the slough, thereby obstructing access to CRV's planned marina. CRV sued the EPA in the Court of Federal Claims, complaining that the installation of the boom amounted to a Fifth Amendment taking. That suit was eventually dismissed on the ground that no physical taking had occurred and any regulatory claim was barred either by the statute of limitations or for want of standing because the EPA had issued its Record of Decision on the slough remediation before CRV purchased the property. *Id.* at 1245.

On appeal, the Federal Circuit dismissed CRV's claim for lack of standing because CRV did not acquire the property until after the EPA issued its ruling. The court explained that "[i]t is well established that only persons with a valid property interest at the time of the taking are entitled to compensation." *Id.* at 1249 (internal quotations and citations omitted). The Federal Circuit distinguished *Palazzolo* by explaining that there the takings claim did not ripen until the development application was rejected (during petitioner's ownership), whereas in *CRV Enterprises*, the claim ripened when the EPA issued its Record of Decision (before petitioner's ownership). *Id.* at 1250. As here, the court side-stepped *Palazzolo* by focusing on facts that this Court

never described as particularly relevant to its decision and ignoring this Court's announced rule that post-enactment purchase does not forestall a takings claim.

The Federal Circuit had suggested limitations on *Palazzolo* in 2005, finding that although a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," it is "particularly difficult to establish a reasonable investment-backed expectation in circumstances like these." *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005). Like the Ninth Circuit, the Federal Circuit cited an earlier decision that the "purpose of consideration of plaintiffs' investment-backed expectations . . . is to limit recoveries to property owners who can demonstrate that they 'bought their property in reliance on a state of affairs that did not include the challenged regulatory'" regime. *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

Of course, the Federal Circuit did not rule in this manner in the immediate aftermath of *Palazzolo*. As Petitioners note, just after *Palazzolo* came down, the court stated:

> Neither *Palazzolo* nor *Nollan* holds that investment-backed expectations are irrelevant in analyzing a regulatory taking. The *Palazzolo* Court rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never

> challenge the regulation under the Takings Clause.

Rith Energy v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001). Specifically, the Federal Circuit seemed largely to agree with Justice O'Connor's *Palazzolo* concurrence that while the Court rejected a "blanket rule," the holding did not mean "that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

As the Federal Circuit explained in another case, the court focused on Justice O'Connor's concurrence because the majority opinion did not address the "bearing of the regulatory environment at the time of land acquisition on the reasonable investment-backed expectations prong of the Penn Central analysis." *Appolo Fuels, Inc., v. United States*, 381 F.3d. 1338, 1348 (Fed. Cir. 2004); *see also Hansen v. United States*, 65 Fed. Cl. 76, 130 (Fed. Cl. 2005) (viewing *Palazzolo* as standing for the premise that "takings claims could be transferred only if the claim had not yet ripened"). The statement from *Norman* suggesting it is "particularly difficult to establish" reasonable investment-backed expectations in such circumstances seems inconsistent with this previous interpretation of *Palazzolo*.

* * *

Even though the Ninth Circuit here (like the Federal Circuit in *CRV Enterprises*) was fully aware of *Palazzolo*, it applied that case in a manner that conflicts with several other courts and is irreconcilable with this Court's jurisprudence. Given the recent cases where courts of appeal have failed to

follow precedent, this Court should grant *certiorari* to settle the apparent confusion about *Palazzolo* and reaffirm that the Takings Clause does not expire when title to property transfers.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRANDON SIMMONS
HOGAN LOVELL US LLP
555 Thirteenth St., NW
Washington, D.C. 20004
(202) 637-5600
brandon.simmons@hoganlovells.com

ILYA SHAPIRO
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

April 13, 2011