No. 10-1125

In the

Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

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

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In *Penn Central*, this Court held that regulations designed to draw a public benefit from private property would not be treated as regulatory takings subject to the just compensation clause of the Fifth Amendment if the public benefit significantly outweighed the investment-backed expectations of the private property owner subjected to the regulation. Yet this Court also reiterated that the principal purpose of the Fifth Amendment is to prevent "some people alone [from] bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole." A number of legal scholars have subsequently noted that a broad reading of the *Penn Central* balancing test undermines that purpose, and in this case, the Ninth Circuit upheld a regulatory taking that demonstrably does not provide *any* public benefit, simply transferring a significant property right from one private owner to another, merely because the regulation was in place when the current property owner purchased the regulated property.

1. Does this Court's decision in *Palazzolo* foreclose the holding of the Ninth Circuit below?
2. Did the Ninth Circuit misapply *Penn Central*'s three-factor test to accomplish an end-run around *Palazzolo*?
3. Should *Penn Central*'s balancing test be clarified so that non-nuisance-preventing regulations that yield benefits for the public are treated as takings, in order to more closely comport to the purpose served by the Fifth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae Center for Constitutional Jurisprudence,[1] is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

Amicus Curiae Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing ***Reason*** magazine, as well as commentary on its websites, reason.com, reason.org, and reason.tv, and by issuing

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[1] Pursuant to this Court's Rule 37.2(a), all parties received the requisite 10-day notice and have consented to the filing of this brief. Blanket letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases, such as this, that raise significant constitutional issues involving protection of property rights.

REASONS FOR GRANTING THE WRIT

I. If Allowed to Stand, the Ninth Circuit's Decision Would Neuter this Court's Decision in *Palazzolo*.

The en banc decision of the Ninth Circuit below quite clearly refused to give credence to this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). As Petitioners have aptly pointed out, and as the dissenting opinion noted as well, *Palazzolo* held in no uncertain terms that a purchaser of property burdened with a regulation does not lose the ability to challenge the regulation as an unconstitutional taking, but rather inherits the cause of action from the predecessor in interest. *Palazzolo*, 533 U.S. at 627. The minor factual differences between the *Palazzolo* and the case at bar are differences of no moment, certainly not grounds for distinguishing *Palazzolo* on the relevant legal inquiry. *Amici* agree with Petitioners that certiorari is warranted for that reason, as well as the fact that the Ninth Circuit is now at odds with a number of sister Court's in its innovative interpretation of *Palazzolo*.

II. The Ninth Circuit's Reliance on *Penn Central*'s "Investment-Backed Expectations" Factor to End-Run *Palazzolo* Highlights the Incoherence of the *Penn Central* Test.

Although *Amici* agree that the Ninth Circuit decision below completely misconstrued this Court's decision in *Palazzolo*, the Ninth Circuit was able to do this end-run of *Palazzolo* because of the underlying incoherence in the test that was first set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and has now been so broadly interpreted by some lower courts as to provide fodder for mischief of the kind manifested by the court below.

Critiques of the *Penn Central* test are legion. Just this past year and referencing this very case, among others, William Wade noted that "application of the *Penn Central* test . . . remains in disarray." William W. Wade, *Penn Central's Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 549 (2010). "The three-part test has come under considerable criticism," with the dominant criticism holding "that the test is incomprehensible." Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 342 (2006). There is "widespread confusion" about it. D. Benjamin Barros, *The Police Power and the Takings Clause,* 58 U. MIAMI L. REV. 471, 471 & n.1 (2002). It is a "muddle." Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984). There is a "widespread view that regulatory takings is an especially confused field of law." John D. Echeverria, *Making*

Sense of Penn Central, 39 ENVTL. L. REP. NEWS & ANALYSIS 10471 (2009).

Because of this muddled confusion, the Ninth Circuit was able to pitch its end-run of *Palazzolo* in some of the language of the *Penn Central* test, namely, the "primary factor" that courts should consider "the extent to which the regulation has interfered with investment-backed expections." Pet. App. 18a. The fact that Guggenheim purchased the property at issue with the rent control restrictions in place was "fatal" to Guggenheim's takings claim, the court held. The loss of $10,000 per year in rents, and the transfer of more than $100,000 in property value from the landowner to the mobile home owners who were tenants on the land, "had happened before the Guggenheim's bought the mobile home park." That lost value was therefore no part of the Guggenheim's "distinct investment-backed expectations." Pet. App. 18a-19a.

Obviously, something is amiss if the lower courts are able to utilize language in the *Penn Central* three-factor test to negate a subsequent holding of this Court. As Professor Echeverria has noted, this Court "has provided little guidance on the meaning and proper application of these three factors, perpetuating the essentially ad hoc approach to takings analysis. . . ." Echeverria, *Making Sense of Penn Central*, 39 Envtl. L. Rep. News & Analysis at 10471. As a result, "the *ad hoc Penn Central* analysis has appeared to mask, if not intellectual bankruptcy, . . . at least considerable uncertainty about the fundamental parameters of takings law." *Id.* at 10472.

"If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intui-

tion, it is imperative to clarify the meaning of *Penn Central*." *Id.* This Court should grant the petition and schedule full briefing and oral argument to correct not just the Ninth Circuit's clear error of failing to follow *Palazzolo*, but the broader and more fundamental error in its application of the *Penn Central* balancing test.

III. Balancing the Public Benefits against Private Property Owners Investment-Backed Expectations Turns the Fifth Amendment's Purpose On Its Head.

There is an even more profound problem with how the *Penn Central* test is being applied that is highlighted by the Ninth Circuit's opinion below. By interpreting the *Penn Central* factors to permit regulations that restrict a non-nuisance use of private property in order to advance some public benefit, decisions like that of the Ninth Circuit below have allowed the *Penn Central* three-factor test to turn the protections of the Takings Clause on their head.

As this Court has repeatedly recognized, including in *Penn Central* itself, the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Penn Central*, 438 U.S. at 123-24; *see also id.* at 139 (Rehnquist, J., dissenting) ("The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties"). This aspect of the Takings

Clause provides protection of individual rights from raw majoritarian rule.

The *Penn Central* three-factor test, as it has come to be interpreted in cases such as the opinion of the Ninth Circuit below, severely undercuts that protection. *Penn Central* was not meant to have such a sweeping reach. As Justice Brennan's own lead law clerk on the case, David Carpenter, has acknowledged, the opinion was meant to be narrow, "making modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray." David Carpenter et al., *Looking Back on* Penn Central: *A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. J. 287, 307-08 (2004).

Justice Brennan's "modest" effort to bring some content to regulatory takings has taken the lower courts down irrelevant and pernicious paths of inquiry. The economic impact of the regulation to the private property owner, and particularly the extent to which the regulation has interfered with his investment-backed expectations, when considered apart from whether a particular regulation is designed to prevent harmful uses of the private property, is really more relevant to damages and therefore the "just compensation" prong of the Takings analysis than the initial inquiry into whether a taking has occurred at all.

When those economic impacts are balanced against the benefit that the government will derive from its regulations,[2] the *Penn Central* test lends it-

[2] Although Justice Brennan's formulation of the three-factor test in *Penn Central* speaks of "the character of the government

self to the very abuse that the Fifth Amendment was designed to protect against. Indeed, the larger the benefit to be gained for the public (or, worse, a private benefit for a discreet segment of the public, as is the case here), the more tempted government will be to impose economic impacts on individual property owners through regulations designed to grab that benefit without having to pay for it.

This case provides ample example of what has gone wrong with Takings Clause analysis under *Penn Central.* A discreet segment of the population (mobile home owners) was able to obtain a financial windfall by securing from the local government a regulation that imposed a massive economic impact on a necessarily much smaller segment of the population (the mobile home park owners, including Petitioner Guggenheim, who rented land to multiple mobile home owners). Evidence introduced in the trial court showed that the ordinance forced Guggenheim to rent "at close to an 80 percent discount below the market rate." Pet. App. 100a, 122a. The present value of that below-market rent, locked in as it was by local ordinance, resulted in a massive transfer of value from Guggenheim to the mobile home owners of more than $100,000 each. See Pet. App. 8a-9a, 18a (noting Guggenheim's expert testimony that the

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action," he expands upon that to note that interferences with the use of private property which arise "from some public program adjusting the benefits and burdens of economic life *to promote the common good*" would be permissible. *Penn Central,* 438 U.S. at 124 (emphasis added). The fact that New York City's "Landmarks Preservation Law" was designed to "benefit its citizens in a variety of ways," *Penn Central*, 438 U.S. at 109, was thus balanced against the economic impacts to the individual property owners.

resale value of an individual mobile home was $14,000 without the rent control ordinance, but $120,000 with the ordinance).

As Judge Bea correctly noted in his dissent below, the "designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home." *Id.* at 44a. Even if a general public benefit had been obtained by this ordinance, it is hard to imagine a regulatory scenario that more runs afoul of the Fifth Amendment's purpose of "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *Penn Central*, 438 U.S. at 123-24. That the benefit here was grabbed by a discreet segment of the population for purely private gain makes the problem even worse.

Because *Penn Central*'s ad-hoc, three-factor balancing test can be used, as it was in this case, to uphold the very abuses that the Fifth Amendment was designed to prohibit, clarification of *Penn Central* is both warranted and long overdue. Granting certiorari in this case would provide that much needed opportunity.

CONCLUSION

The petition for writ of certiorari should be granted, and the questions presented reformulated to allow this Court to address not just the Ninth Circuit's *Palazzolo* error but the lingering confusion over the *Penn Central* three-factor balancing test that led to it.

Respectfully submitted,

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