No. 10-1125

In the

Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION, CRV ENTERPRISES, INC., AND C. RYAN VOORHEES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Notwithstanding this Court's contrary ruling in *Palazzolo v. State of Rhode Island*, may a property owner be barred from challenging a land use restriction as a regulatory taking solely because the regulatory restrictions were enacted before he purchased the property?

2. Notwithstanding the three-pronged balancing test for regulatory takings established by this Court in *Penn Central Transportation Co. v. City of New York*, may a takings claim be resolved against a landowner solely on the basis of the appellate court's economic theories?

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Pacific Legal Foundation (PLF), Western Manufactured Housing Communities Association (WMA), CRV Enterprises, Inc., and C. Ryan Voorhees respectfully submit this brief amicus curiae in support of Petitioners Daniel Guggenheim, et al. (the Guggenheims).[1]

INTEREST OF AMICI CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. Representing the views of tens of thousands of members and supporters, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property.

PLF attorneys have litigated many leading cases before this Court and around the nation arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. PLF attorneys were counsel of record in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

PLF is keenly aware of the plight of owners of mobile home parks in California, whose right to make

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[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to all counsel of record of its intention to file this amicus brief. The parties have issued general consents to the filing of amicus briefs in this matter, which have been duly lodged with the Court.

No counsel for a party authored any portion of this brief and no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person or group made a monetary contribution intended to fund the preparation or submission of this brief.

productive use of their land is frequently abused by local jurisdictions that are under the political influence of park tenants. PLF attorneys have represented park owners or filed amicus briefs challenging the constitutionality of particularly onerous mobile home rent control ordinances in numerous cases, including *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), *op. withdrawn on rehearing*, 415 F.3d 1027 (9th Cir. 2005), and *Montclair Parkowners Ass'n v. City of Montclair*, 264 F.3d 829 (9th Cir. 2001). PLF filed a brief amicus curiae in support of the Guggenheims in the proceedings below.

WMA is the nation's largest trade organization representing mobile home park owners in California and the nation. WMA's members own, operate, and control over 1,800 parks throughout California, with approximately 180,000 resident spaces. WMA's activities include educational programs and legislative and judicial advocacy, including amicus curiae appearances in leading cases before this Court and the California Supreme Court, including *Yee*, 503 U.S. 519, *Castaneda v. Olsher*, 162 P.3d 610 (Cal. 2007), *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 14 P.3d 930 (Cal. 2001), and *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001). WMA filed a brief amicus curiae in support of the Guggenheims in the proceedings below.

WMA's members are interested in this case because it raises an important issue that profoundly affects their industry: the extent to which the Fifth Amendment Takings Clause protects owners of mobile home parks against confiscatory rent and vacancy control regulation.

CRV Enterprises, Inc., is a real estate development firm doing business in northern California. C. Ryan Voorhees is the director, president, and primary managing officer of CRV Enterprises, Inc. Mr. Voorhees and his firm (collectively, CRV) are Petitioners before this Court in *CRV Enterprises, Inc. & C. Ryan Voorhees v. United States*, No. 10-1151 (U.S. filed Mar. 17, 2011). In that case, the Federal Circuit Court of Appeals held that CRV lacked standing to bring a regulatory takings claim because it did not own the property in question at the time the regulatory scheme was adopted. CRV regards the holding in that case to be a variation of the Ninth Circuit's en banc ruling in the case at bar: that regulatory takings claims may be extinguished by a mere transfer of title to property subject to the regulatory regime. For that reason, CRV is vitally interested in a reaffirmation of this Court's *Palazzolo* doctrine, which established that such claims survive the sale of regulated property.

These Amici seek to provide this Court with an additional viewpoint on two important issues in this case. First, the regulatory takings doctrine of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), requires courts to weigh and balance each of three different factors in determining whether takings liability has accrued. It is a fundamental doctrinal error to rule that a takings claim cannot succeed if the government prevails on only one of these three criteria, as the Ninth Circuit ruled in the majority opinion below. This error is compounded when the single criterion on which the city prevailed (the Guggenheims' supposed lack of distinct, investment-backed expectations) was decided not by the ad hoc factual showing required by *Penn Central*,

but by the court's speculative recitations of economic theory.

Second, Amici seek to impress upon this Court the importance of maintaining a broad and reasoned interpretation of the rule of *Palazzolo v. Rhode Island*, that takings claims cannot be barred solely because unconstitutional restrictions were already in place at the time the plaintiffs acquired the property. If *Palazzolo* is narrowed to preclude post-enactment purchasers from filing takings challenges to restrictive land use regulations, as the Ninth Circuit ruled below, it would empower virtually any governmental entity to "put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627.

INTRODUCTION

This case involves a Fifth Amendment takings challenge to a regulatory wealth transfer effected by the City of Goleta's mobile home park rent control ordinance. Petition for Writ of Certiorari Appendix (Pet. App.) 8a. The property was already subject to rent control under a Santa Barbara County ordinance at the time the Guggenheims purchased it. Pet. App. 6a. When the City of Goleta was incorporated and adopted the county's rent ordinance as its own, the Guggenheims sued the city for effecting a regulatory taking of their property. Pet. App. 7a-8a.

In September of 2009, a three-judge panel of the Ninth Circuit struck down Goleta's ordinance, applying the three-part balancing test of *Penn Central*. See Pet. App. 55a (Appendix B). The panel opinion by Judge Bybee considered each of the three factors in turn and found that both the character of the regulation (a "naked wealth transfer") and its economic impact (an

80%-90% reduction in the park's value) favored the Guggenheims. Pet. App. 103a-108a. On the other hand, the owners' investment-backed expectations were weak, in the sense that the park's rents had previously been regulated. Pet. App. 108a-116a. Weighing and balancing each of these three factors as required by *Penn Central*, the panel concluded that Goleta's rent control law was unconstitutional. Pet. App. 122a-123a.

The city's motion for rehearing en banc was granted, and on December 22, 2010, a divided eleven-judge en banc panel of the Ninth Circuit rejected the Guggenheims' takings claim. Judge Kleinfeld's opinion for the en banc majority found it dispositive that the plaintiffs purchased their park after the Santa Barbara County ordinance was already in effect. Pet. App. 18a. According to the majority below, a post-enactment purchaser could have no distinct, investment-backed expectation that rent control would ever be struck down as unconstitutional, and the Guggenheims' claim was therefore barred as a matter of law. Pet. App. 19a.

SUMMARY OF ARGUMENT

The Ninth Circuit's en banc opinion directly conflicts with *Palazzolo* and is inconsistent with the requirements of *Penn Central* in important respects. Instead of evaluating and weighing each of *Penn Central*'s "relevant factors," as did the 2009 three-judge panel, the decision below gives determinative effect to a single factor—the Guggenheims' post-enactment purchase of the park. As was noted by the dissent, this approach impermissibly "converts a three-factor balancing test into a 'one-strike-you're-out' checklist." Pet. App. 26a. Moreover, the central premise cited by

the majority in support of its reasoning, that the Guggenheims acquired the park for a price that was discounted to offset the economic impact of rent control, was based on no factual evidence whatsoever, but was solely a product of the court's own economic theorizing. Finally, the Ninth Circuit evaluated the reasonableness of the Guggenheims' investment-backed expectations in terms of whether the park owners had correctly foreseen the outcome of this very litigation. Such an approach renders the expectations prong of *Penn Central* circular and tautological, since by definition owners who successfully strike down land use restrictions in court will be found to have had reasonable expectations of the unregulated use of their property, while those who fail will not.

The opinion below would effectively restore the regulatory "Notice Rule" that was struck down by this Court in *Palazzolo*. If restrictive land use regulations are immunized against takings lawsuits by the mere sale of regulated property, as the Ninth Circuit ruled below, the government "would be allowed, in effect, to put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627. The purported distinction advanced by the Ninth Circuit—that Anthony Palazzolo acquired his regulated property by operation of law, while the Guggenheims purchased theirs—is of no legal significance, and if taken seriously would limit *Palazzolo* to its facts, depriving property owners throughout the Ninth Circuit of important constitutional protections enjoyed by the residents of every other Circuit.

This Court should grant the Petition for Writ of Certiorari to restore uniformity among the Circuits in the treatment of regulatory takings claims brought by

plaintiffs who purchase property subject to unconstitutional regulations.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF *PENN CENTRAL*, AND TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE OF NATIONWIDE IMPORTANCE

All parties agree that the Guggenheims' regulatory takings claim is governed by the framework set out by this Court in *Penn Central*, 438 U.S. 104. Under that decision, takings liability turns on an "essentially ad hoc, factual inquiry":

> 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. So, too, is the character of the governmental action.

Id. at 124 (citation omitted). Instead of engaging in this three-pronged factual inquiry, however, the en banc panel below resolved the Guggenheims' *Penn Central* claim solely on the basis of the court's own speculations concerning the price the plaintiffs may have paid for their park. With no evidence before it, the majority confidently theorized that "the price they paid for the mobile home park *doubtless* reflected the burden of rent control they would have to suffer." Pet. App. 18a (emphasis added). Thus, to the en banc panel, the mere fact that the Guggenheims purchased

their park after the county's rent control law had been adopted was "fatal to the Guggenheims' claim." *Id.*

This ruling departs from this Court's *Penn Central* doctrine and conflicts with other courts' interpretations of *Penn Central* in three important respects. First, *Penn Central* on its face requires courts to examine, weigh, and balance three separate factors in determining whether liability for a taking has been incurred. Instead, the decision below elevates a single element of this calculus to determinative status—the relationship of the date of acquisition to the date of the regulatory enactment. Second, *Penn Central* emphasizes the need for a case-by-case *factual* inquiry. Instead, with no facts before it, the panel below resolved the case entirely on the basis of its own speculative application of economic theory. Finally, the en banc panel determined that the Guggenheims' investment-backed expectations were insufficiently "reasonable" or "distinct" entirely by reference to the fact that, at the time they purchased their property, the Guggenheims incorrectly anticipated that the majority opinion in this case would overturn Goleta's regulatory wealth transfer, rather than uphold it. Neither this Court nor any other court has placed such a narrow, self-referential interpretation on *Penn Central*'s expectations prong, which would render the entire takings inquiry circular and meaningless.

A. By Impermissibly Collapsing *Penn Central*'s Three-Part Balancing Test into a Single Inquiry, the Decision Below Conflicts with the Precedent of This Court and the Interpretation of *Penn Central* by Other Circuits

Although none of *Penn Central*'s three "relevant considerations" for establishing takings liability is defined with precision, subsequent opinions and virtually all commentators agree that reviewing courts must evaluate and weigh all three factors to determine whether, on balance, a violation of the Fifth Amendment has occurred. *See, e.g.*, J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351, 398-99 (2005) ("[t]o comport with *Palazzolo*, courts must consider and balance *all* the relevant partial takings factors before determining whether a taking has occurred, regardless of the outcome of the investment-backed expectations criterion"); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 Va. Envtl. L.J. 43, 66-67 (2004) ("The investment-backed expectations factor must be weighed and balanced against the other two factors .... For that reason, a landowner need not necessarily prove that the regulation frustrated distinct investment-backed expectations in order to prevail on her partial takings claim.").

In contrast, the majority below erroneously collapsed *Penn Central*'s three-factor balancing test into a single criterion. The mere fact that Santa

Barbara County's rent control ordinance had been adopted prior to the Guggenheims' acquisition of their property meant, according to the Ninth Circuit, that the owners could have no investment-backed expectations of ever being free of rent control, and this fact alone was "fatal to the Guggenheims' claim." Pet. App. 18a.

It has long been recognized that elevating the timing of acquisition to dispositive status in resolving *Penn Central* claims is unsupportable as a matter of either logic or law. *See, e.g.*, Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 Haw. L. Rev. 533, 565-67 (2002) (noting the circularity of the argument that the state may unilaterally extinguish property rights if subsequent buyers are deemed to have no reasonable expectation that those rights can be enforced in court). It is more important, however, for this Court to seize this opportunity to clarify that *Penn Central* does not permit the resolution of takings claims by reference to *any* single factor, standing alone.

B. Certiorari Should Be Granted To Clarify That Appellate Courts May Not Substitute Their Own "Pet" Economic Theories for the Factual Evidence Required To Evaluate a *Penn Central* Claim

The Ninth Circuit en banc panel adversely resolved the Guggenheims' *Penn Central* claim solely on the grounds that the plaintiffs had purchased their mobile home park after the adoption of Santa Barbara County's rent control ordinance. Pet. App. 18a. The significance of the post-enactment purchase, according to the majority below, is that the Guggenheims supposedly "bought the property for a low price

reflecting the economic effect of the regulation." Pet. App. 15a. Again, the court insisted, "the price they paid for the mobile home park *doubtless* reflected the burden of rent control they would have to suffer." Pet. App.18a (emphasis added). And yet again, "[t]he Guggenheims *doubtless* paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream." Pet. App. 21a-22a (emphasis added).

It would not be an overstatement to say that the entire decision below turns on this point. The majority did not seriously consider the abundant factual evidence before it regarding the nature of the regulation (a "naked wealth transfer" with no offsetting social benefits), or its economic impact (at least an 80% reduction in the value of the park). Both these factors were simply folded into the court's singular fixation on the timing of acquisition. *See, e.g.*, Pet. App. 18a (dismissing the "character" inquiry by noting that the Goleta Ordinance was a continuation of the Santa Barbara County ordinance, which was enacted before the Guggenheims acquired title.). Rather, the takings claim was foreclosed entirely on the court's assertion that the Guggenheims could have had no distinct, investment-backed expectation of ever being free of rent control, because the full economic impact of the ordinance had "*doubtless*" been discounted into the price they paid for the park. *Id.*

Given the crucial nature of this point to the entire fabric of the majority opinion, one is entitled to ask, *how does the court know?* What price *did* the Guggenheims pay, and did it reflect the expectation—as Judge Kleinfeld's opinion repeatedly insists—that the rent ordinance would remain in

effect, illegally depressing the park's revenues in perpetuity? Or did it incorporate the reasonable expectation of both parties—seller and buyer—that the then-existing restrictions were patently unconstitutional, and would surely be struck down in court at the first opportunity?

Amazingly, the record before the Ninth Circuit contained *no evidence on this issue whatsoever!* Judge Kleinfeld felt so confident of the price the Guggenheims "*must*" have paid that he based his entire opinion upon it, yet in truth neither he nor any other member of the en banc panel could cite to even a shred of factual evidence in the record to support this empirical claim. Even more remarkably, the majority clearly implies that the facts are irrelevant, to the extent they might fail to conform to Judge Kleinfeld's economic theories. At one point the opinion below seems to concede that the price of the park "might conceivably" have reflected the parties' belief that the rent control law was unconstitutional and would be overturned. Pet. App. 19a. But, according to Judge Kleinfeld, any such real-world component of the price should simply be ignored, because it would comprise a "speculative premium[!]" *Id.* What mattered to the majority was not what the Guggenheims might *actually* have paid for their property, but what the majority's theoretical speculations suggested they *must* have paid!

Ironically, in electing to ignore the ample factual evidence that had been proffered concerning the character of Goleta's wealth-transferring rent ordinance, the majority opinion calls for courts to refrain from deciding constitutional questions on the basis of "Economics 101." Pet. App. 24a. Yet the sole

support for the majority's opinion is the substitution of the court's own elementary, unsupported economic theorizing for the determination of essential factual questions by the trial court.

This Court should grant certiorari to definitively establish that *Penn Central*'s inherently fact-driven inquiry cannot be resolved or foreclosed solely on the basis of an appellate court's speculative economic theories, no matter how firmly or passionately held.

C. Certiorari Should Be Granted To Clarify That the Test of "Reasonable" or "Distinct" Investment-Backed Expectations Is *Not* Whether the Plaintiff Correctly Predicts the Outcome of Litigation

The opinion below determined the Guggenheims' investment-backed expectations to be insufficiently reasonable or distinct because they incorporated a belief that the previously enacted rent regulations were unconstitutional and would be overturned. "[The Guggenheims] could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent"—*i.e.*, rents that were not artificially depressed to finance a politically engineered wealth transfer. Pet. App. 19a. In effect, the opinion finds the Guggenheims' expectations to have been unreasonable because they anticipated that the rent ordinance might be struck down—as it was by Judge Bybee's 2009 panel opinion in this case—rather than upheld, as it was by Judge Kleinfeld's 2010 en banc opinion. In terms of the en banc panel, the court found the Guggenheims' investment-backed expectations to be unreasonable because the plaintiffs incorrectly foresaw the votes of three Ninth Circuit

judges. If any three members of the en banc majority below had switched their votes, Goleta's rent control ordinance would today be recognized as unconstitutional, rents in the Guggenheims' park would be unregulated, and their investment-backed expectations would have been fully realized. But because of those three votes, rent control survives, and the Guggenheims' expectations were therefore found by the en banc panel to be unreasonable.

Neither this Court nor any other court has ever held—prior to the opinion below—that *Penn Central*'s investment-backed expectations prong is to be evaluated in terms of the accuracy with which a plaintiff can predict the outcome of litigation. Rather, this element of the *Penn Central* test merely asks whether the plaintiff has invested resources in pursuit of some "distinctly perceived, sharply crystallized" expected use of the property. *See* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1233 (1967). Here, there can be no doubt that the Guggenheims invested in their property in the expectation that it might one day operate without the constraints of rent control. The outcome of subsequent litigation might vindicate this expectation, or extinguish it. But the ultimate outcome of the Guggenheims' litigation cannot, in itself, determine whether their investment-backed expectations were sufficiently reasonable or distinct to satisfy the *Penn Central* analysis.

II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS IN THE PROPER APPLICATION OF *PALAZZOLO v. RHODE ISLAND*

The Ninth Circuit's error in resolving this case solely on the basis that the Guggenheims were post-enactment purchasers is especially remarkable because it was specifically addressed and rejected by this Court in *Palazzolo v. State of Rhode Island.* Justice Kennedy's majority opinion underscored the problem and reversed a state court decision that rested precisely on the thesis of the majority below:

> 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.

Palazzolo, 533 U.S. at 626. Even Justice O'Connor's concurrence in *Palazzolo*, which would allow notice of preexisting regulations to be considered in determining an owner's investment-backed expectations, cannot be employed, as the Ninth Circuit did below, to completely bar takings claims without consideration of the remaining *Penn Central* factors:

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much

> power to redefine property rights upon passage of title.

Id. at 636 (O'Connor, J., concurring). Because the opinion below essentially limits *Palazzolo* to its facts, property owners within the Ninth Circuit's jurisdiction will now be deprived of the benefit of this Court's doctrine, unless certiorari is granted and the en banc opinion is overruled.

A. *Palazzolo* Established That Takings Claims Survive a Transfer of Ownership After the Adoption of Measures To Restrict the Use of Property

In *Palazzolo*, this Court was asked to determine whether a property owner "deemed to have notice of an earlier-enacted restriction . . . is barred from claiming that it effects a taking." 533 U.S. at 626. The case was thought to be the culmination of a judicial trend that gained momentum throughout the 1990s, whereby takings claims were summarily dismissed under the so-called "Notice Rule": when the title to property changes hands, the new owner is deemed to have purchased with notice of all existing land use regulations, and is forever barred from challenging them as violating the Takings Clause. *Id.*

This rule was applied by the Rhode Island Supreme Court when Anthony Palazzolo sued for a taking, based on the denial of his application to develop wetlands on his property. The state court held that, because restrictive wetlands regulations had been adopted before Palazzolo acquired title to the parcel, he was precluded from bringing a takings claim based on the impact of the regulations on his land:

> Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired.

Palazzolo v. State of Rhode Island, 746 A.2d 707, 716 (R.I. 2000). A claim for a taking, under this doctrine, could be stated *only* by the owner of record at the time restrictive measures are adopted. Any subsequent transfer of title forever extinguishes any possibility of bringing such a claim, since "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Id.* at 716-17.

Reversing the Rhode Island Supreme Court in *Palazzolo*, this Court flatly rejected the Notice Rule. A doctrine that bars post-enactment buyers from challenging regulations under the Takings Clause would impermissibly allow the State to "shape and define property rights . . . and subsequent owners cannot claim any injury from lost value." 533 U.S. at 626. Writing for the majority, Justice Kennedy observed 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.

Id. at 627.

Unfortunately, the attractiveness of the Notice Rule to courts seeking a quick and clean way to resolve takings claims in favor of the government has proven

stronger than the force of its repudiation in *Palazzolo*. Many lower courts, both state and federal, have continued to apply the Notice Rule *de facto*, routinely barring subsequent purchasers from asserting regulatory takings claims under a wide variety of pretexts. *See* Breemer & Radford, *supra*, at 402-17. The case at bar exemplifies such an exercise in judicial ingenuity.

B. The Ninth Circuit's Reinterpretation of *Palazzolo* As Applying Only When Regulated Property Is Transferred by Operation of Law Is Not Supported by the Language or Rationale of *Palazzolo* Itself, and Conflicts with Decisions of Other Circuits That Have Correctly Applied *Palazzolo*

The court below clearly recognized the obvious tension between its ruling and the teaching of this Court in *Palazzolo*. In order to uphold the City of Goleta's wealth transfer, the Ninth Circuit therefore was required to effectively limit *Palazzolo* to its facts:

> [E]ven though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property . . . .

Pet. App. 15a. As Judge Bea pointed out in dissent, this and other superficial distinctions cited by the *Guggenheim* majority to justify its circumvention of *Palazzolo* "are mere differences, no more significant

than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at 36a-37a (Bea, J., dissenting). But this particular distinction was of crucial importance to the majority's conviction that any subsequent *buyer* of regulated property must "doubtless" pay a price that is discounted to offset any economic impact of the regulation.

Although this reinterpretation of *Palazzolo* was essential to allow the majority below to resolve the Guggenheims' takings claim on the basis of the court's own economic theories, the Ninth Circuit's purported distinction conflicts with both the language and rationale of *Palazzolo* itself. The *Palazzolo* Court expressly rejected the Rhode Island rule that "[a] *purchaser* or a successive title holder" is barred from claiming that a preexisting regulation effects a taking. 533 U.S. at 626. Reiterating, this Court repudiated "the argument that postenactment *purchasers* cannot challenge a regulation under the Takings Clause." *Id.* (emphasis added). And the Court took pains to tie its holding in *Palazzolo* to its previous rejection of the Notice Rule in *Nollan v. Cal. Coastal Comm'n*—a case in which the plaintiffs prevailed on their takings claim despite having purchased their property in an arms-length transaction long after the Coastal Commission's unlawful permit exactions had been statutorily authorized. 483 U.S. at 833 n.2.

Morever, limiting *Palazzolo* to situations in which post-enactment owners acquire their property by means other than purchase flatly conflicts with the precedent of other federal and state courts that have faithfully followed this Court in rejecting the Notice Rule. The opinion below thereby brings the Ninth

Circuit into conflict with decisions of the Federal Circuit (*Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009)); and the Supreme Courts of Ohio (*State ex. Rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002)) and Minnesota (*Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 263 (Minn. 2007)).

Because the en banc decision below is now the law of the Ninth Circuit, its sharp departure from the doctrine of this Court and other federal and state courts on a fundamental principle of constitutional law means that similarly situated citizens will receive radically different levels of protection under the Takings Clause, depending on whether their property lies within the jurisdiction of the Ninth Circuit, or outside it. This intolerable conflict can only be corrected by this Court, which should take the first step toward doing so by granting the Guggenheims' petition for writ of certiorari.

CONCLUSION

The Petition for Writ of Certiorari to the Ninth Circuit should be granted.

DATED: April, 2011.

Respectfully submitted,

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