No. 13-288

In The Supreme Court of the United States

MHC FINANCING LIMITED PARTNERSHIP AND GRAPELAND VISTAS, INC.,

Petitioners,

v.

CITY OF SAN RAFAEL AND CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MANUFACTURED HOUSING INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

HORVITZ & LEVY LLP
JEREMY B. ROSEN, *Counsel of Record*
STEVEN S. FLEISCHMAN
LISA M. FREEMAN
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800
jrosen@horvitzlevy.com
sfleischman@horvitzlevy.com
lfreeman@horvitzlevy.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Manufactured Housing Institute, National Federation of Independent Business

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

KAREN R. HARNED
LUKE A. WAKE, *Of Counsel*
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048

Counsel for National Federation of Independent Business

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

INTERESTS OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations, which represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the Court, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's businesses.

The Manufactured Housing Institute (MHI) is a national trade association that represents all segments of the factory-built housing industry, including manufacturers, lenders, community owners, and retailers. MHI is interested in protecting the constitutional rights of property owners, including the Fifth Amendment rights of mobilehome park owners like the petitioners.

---

[1] This brief was authored by *amici* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici*, their members, or their counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided written consent more than ten days before the deadline to the filing of this brief, and that written consent is either on file with this Court or submitted with this brief.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. **The National Federation of Independent Business (NFIB)** is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB is particularly interested in stopping the victimization of small businesses at the expense of more powerful political interests.

INTRODUCTION

The businesses represented by *amici curiae* rely on the protections of the Takings Clause when making business plans and investments. Yet procedural barriers in the Ninth Circuit have made it increasingly unlikely for businesses in that circuit to ever have the merits of their regulatory takings claims addressed – particularly those raising challenges to rent control ordinances. For those rare cases – such as this one – that manage to make it through the Ninth Circuit's procedural minefield, the Ninth Circuit has

consistently misapplied the substance of this Court's regulatory takings jurisprudence to deprive *amici*'s members of their constitutionally protected property rights.

After a full trial on the takings claims, the federal district court in this case reached a decision on the merits of the petitioners' Fifth Amendment challenge to San Rafael's mobilehome park rent control scheme, holding that the ordinance constitutes a private taking, Pet. App. 81a, and that its application "gives rise to a regulatory taking under the standards set forth in *Penn Central* [*Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)]," *id.* at 64a, based on the magnitude of the economic impact (deprivation of 81% of the property's value), the degree of interference with investment-backed expectations, and the character of the city's conduct, *id.* at 63a-64a. The Ninth Circuit reversed on the merits, holding that the ordinance is "rationally related to a conceivable public purpose" and therefore "does not amount to a private taking," *id.* at 20a, and that "[t]he economic impact, investment-backed expectations, and character" of the ordinance all lead to the conclusion that it "does not constitute a *Penn Central* taking," *id.* at 18a.

By misapplying the three *Penn Central* factors, the Ninth Circuit "effectively eliminate[d] any meaningful constraints on local regulation of property rights based on claims of regulatory or private takings." Pet. 2. First, the Ninth Circuit held that because "mere diminution in the value of property, however

serious, is *insufficient* to demonstrate a taking" only the elimination of *all* value would weigh in favor of a property owner's takings challenge under the first *Penn Central* factor (economic impact). Pet. App. 15a (emphasis added). Second, the Ninth Circuit held that because the petitioners bought the mobilehome park when it was subject to rent control, the second *Penn Central* factor (investment-backed expectation) could not possibly weigh in favor of the takings challenge, i.e, as a matter of law, a property owner cannot have an investment-backed expectation that more severe regulations would not be imposed – or that unconstitutional regulations would be lifted. *See id.* at 16a-17a. Finally, the Ninth Circuit ignored the district court's factual findings related to the third *Penn Central* factor (the character of the governmental action). Instead of giving proper deference to the district court's factual findings, the Ninth Circuit gave "extreme deference" to the City's alleged "public purpose" – essentially proceeding on the assumption that the character of all rent control ordinances weighs in favor of constitutionality. *Id.* at 17a-18a.

Amici have seen how the procedural barriers erected by the Ninth Circuit make it nearly impossible for a regulatory takings case to be reviewed on the merits. This is particularly true of challenges to rent control ordinances, which enjoy a storied (but unfortunate) history in the Ninth Circuit. As one of the rare cases to reach the merits of a regulatory takings claim – in a challenge to a rent control ordinance, no less – this case presents the Court with a unique

opportunity to correct the Ninth Circuit's repeated misapplication of this Court's *Penn Central* and subsequent regulatory takings jurisprudence. Indeed, this Court has been waiting essentially twenty-one years for the opportunity to clarify the standard for regulatory takings claims in the rent control context, since reserving that question for a later date in *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The Court should grant review and reverse the Ninth Circuit's decision, rather than wait another twenty years to bring the Ninth Circuit in line with this Court's Takings Clause rulings.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S DECISION IS IRRECONCILABLE WITH THIS COURT'S DECISION IN *PALAZZOLO*, AND EFFECTIVELY EXTINGUISHES ALL REGULATORY TAKINGS CLAIMS AFTER A PROPERTY IS TRANSFERRED.

A. The Ninth Circuit's decision cannot be reconciled with *Palazzolo*'s rejection of a blanket limitation on takings claims by post-enactment purchasers.

It is black letter that a regulation that "goes too far" in depriving a property owner of the economic value of his or her property, but that does not physically seize the property, may nonetheless be subject to a Takings Clause claim. *See Pa. Coal Co. v. Mahon*,

260 U.S. 393, 415 (1922). Whether a regulation that reduces some, but not all, of a property's value constitutes a "taking" is subject to a three-part test that considers "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Cent. Transp. Co.*, 438 U.S. at 124; Pet. 15.

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001), this Court applied *Penn Central*'s second, "investment-backed expectations" factor to conclude that "a regulation . . . is not transformed into a background principle . . . by mere virtue of the passage of title." In so doing, this Court expressly rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause." *Id*. at 626.

Remarkably, the Ninth Circuit's analysis of the second *Penn Central* factor is *completely* devoid of any reference to *Palazzolo*, and instead reaches the polar opposite result: according to the Ninth Circuit, property rental is a "regulated field" and therefore the petitioners may not object if, post-purchase, "the legislative scheme is buttressed by subsequent amendments" – even where, as here, those substantive amendments radically transformed the value proposition of the property. Pet. App. 16a-17a (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993)).

The Ninth Circuit's ruling in this case is equally as "unfair," "capricious," and "illogical" as the theory rejected by this Court in *Palazzolo*, 533 U.S. at 628. When the petitioners bought the mobilehome park at issue here, the Court had left open the question of whether California's mobilehome park rent and vacancy control constitutes a regulatory taking. *See Yee*, 503 U.S. at 538. As the petition explains, "[g]iven *Yee* and the other background principles of law at the time, MHC had no reason to assume the validity of the existing regulation when it bought the property, and every incentive to challenge it." Pet. 22.

Businesses of all sizes frequently acquire assets with pre-existing regulatory burdens that, at the time of transfer, may have been insufficient to compel the prior owner to challenge the burden at the time of its enactment. This Court has expressly rejected the theory that the *mere existence* of a regulatory regime at the time of a property transfer – a common enough event – extinguishes a takings claim. *Palazzolo*, 533 U.S. at 627-28. The Ninth Circuit, as reflected in its opinion here, has flouted *Palazzolo*. If such decisions are left to stand, the mere fact that an ordinance or other regulation pre-dates a property transfer will be sufficient to extinguish a regulatory takings claim. This affects not only mobilehome park owners like the petitioners, but every other property owner who lives within the jurisdiction of the Ninth Circuit. Because the Ninth Circuit's holding in this case directly contravenes the Supreme Court's *Palazzolo* precedent, this Court should grant certiorari.

B. The Ninth Circuit's *Penn Central* analysis ignores economic reality.

According to the Ninth Circuit, the price the petitioners paid for the property at issue "doubtless reflected the burden of rent control they would have to suffer." Pet. App. 17a (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc)). This reasoning is flawed for at least two reasons. *First*, the price of the property at the time of the petitioners' purchase could have reflected at most the diminution in property value caused by the 1989 rent control ordinance in place when the petitioners purchased the property in 1994. Certainly, the significant alterations to the rent control ordinance in 2000 could not have been factored into the 1994 purchase price. Indeed, as the district court found, these amendments reduced the petitioners' revenue streams by nearly $11 million. Pet. App. 45a.

Second, the Ninth Circuit's decision ignores the economic implications of its *Guggenheim* and *MHC* decisions: prior to these decisions – and therefore at the time that the petitioners purchased the property in 1994 – a buyer purchasing regulated property could take a *calculated* risk that the regulation could, at some point, be lifted by a court in a Takings Clause challenge. *See* Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 Conn. L. Rev. 7, 61-62 (2003). In other words, as Justice Scalia explained in his *Palazzolo* concurrence, "[t]he 'investment-backed expectations' that the law

will take into account do ***not*** include the ***assumed validity*** of a restriction that in fact deprives property of so much of its value as to be unconstitutional." 533 U.S. at 637 (Scalia, J., concurring) (emphases added).

The Ninth Circuit's flawed analysis of *Penn Central*'s second factor betrays the court's fundamental misunderstanding of the economic implications of its rule, and its ignorance of the significant economic harms that the Ninth Circuit's decision imposes on *amici*'s members both within and outside of the mobilehome industry.

C. The Ninth Circuit's decision is not isolated and demands review by this Court.

The *MHC* decision follows closely on the heels of another regulatory takings case in which a divided en banc panel rejected a Takings Clause challenge to a 2002 ordinance re-adopted by the City of Goleta after it incorporated a mobilehome park in Santa Barbara County that had been subject to a rent control ordinance since 1979. *Guggenheim*, 638 F.3d at 1115. The Guggenheims had purchased the property in 1997 – eighteen years after the Santa Barbara ordinance was enacted, but five years before the new Goleta ordinance. *Id.*

In a remarkable disavowal of this Court's precedent, the Ninth Circuit's en banc majority stated that *Palazzolo* was of "no help" to the Guggenheims, *id.* at 1118, because they purchased the park after the enactment of the ordinance and therefore "had no

concrete reason to believe they would get something much more valuable, because of hoped-for legal changes," *id.* at 1121. The *Guggenheim* dissenters argued that the majority's decision in that case "directly contravenes Supreme Court precedent" and "comes without legal authority." *Id.* at 1128 (Bea, J., dissenting, joined by Kozinski, J. and Ikuta, J.); *see also id.* at 1133 (the Ninth Circuit majority "flout[ed] the Supreme Court's holding in *Palazzolo*").

Given the Ninth Circuit's continued flouting of this Court's precedent, only review by this Court will ensure that takings law is properly applied in the circuit for both mobilehome park owners and all other property owners subject to the erroneous Ninth Circuit takings decisions.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE IS A GOOD VEHICLE TO PROVIDE NECESSARY GUIDANCE ON HOW TAKINGS CLAIMS SHOULD BE ANALYZED UNDER *PENN CENTRAL*.

A. Significant procedural obstacles make it very difficult for a federal case challenging a regulatory taking to be adjudicated on the merits.

In the Ninth Circuit, regulatory takings claims must be brought under 42 U.S.C. § 1983. *See Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992).

As relevant to this case, most facial takings claims by mobilehome park owners are likely to be time-barred, inasmuch as California allowed local governments to enact rent control ordinances in 1978, *see* California's Mobilehome Residency Law (Cal. Civ. Code §§ 798-799.11 (West 2007)), yet claims against such ordinances are subject to California's *two-year* statute of limitations for personal injury claims, *see Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 & n.2 (9th Cir. 2003) (citing Cal. Civ. Proc. Code § 335.1 (West 2003)). Indeed, by 1992, seventy cities in California had adopted mobile-home rent control ordinances. *Galland v. City of Clovis*, 16 P.3d 130, 135 (Cal. 2001). The result is that property owners' facial challenges to mobilehome rent control ordinances are almost always held to be time-barred. *See, e.g.*, *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1193 n.15 (9th Cir. 2008); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993); *De Anza Props. X, Ltd. v. Cnty. of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991).

Even substantive amendments to rent control ordinances only restart the limitations clock for facial challenges if those amendments "alter the effect of the ordinance upon the plaintiffs," *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) (quoting *De Anza*, 936 F.2d at 1086) (internal quotation marks omitted), a standard the Ninth Circuit applies with a firm hand to bar almost every mobilehome park owner's facial

challenge to a rent control ordinance. *See, e.g.*, *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 957 (9th Cir. 2011) ("[T]he facial takings claim is time-barred because the 2006 Amendment to the Guidelines cannot be reasonably read as a substantive amendment of the 1979 Ordinance that alters its effect on mobilehome park owners."); *Besaro Mobile Home Park, LLC v. City of Fremont*, 289 F. App'x 232, 233 (9th Cir. 2008) ("The Amendment did not create a new facial cause of action because the aspect of the Amendment to which [the plaintiff] objects is a continuation of an aspect of the Ordinance that the City has had in place since 1992.").

Significant procedural hurdles also confront those bringing as-applied regulatory takings claims, which are not ripe until 1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), and 2) the plaintiff has "[sought] compensation through the procedures the State has provided for doing so," *id.* at 194.

Following *Williamson County*, the Ninth Circuit requires as-applied takings claims to be fully litigated in state court before the claims are considered ripe. *See, e.g.*, *Colony Cove*, 640 F.3d at 958. Specifically, a plaintiff must pursue a so-called administrative *Kavanau* adjustment before the local administrative agency and then challenge that administrative ruling in state court. *See San Remo Hotel v. City & Cnty. of*

San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998); *see also Colony Cove*, 640 F.3d at 958 ("The state procedure a plaintiff asserting an as applied challenge to a rent control ordinance must pursue includes a '*Kavanau* adjustment,' which involves filing a writ of mandamus in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board.").[2]

But, once takings claims have been fully litigated in state court, i.e., once the claims are ripe, the Ninth Circuit must give the state court's rulings issue-preclusive effect. *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 347-48 (2005). This legal catch-22 makes it unlikely that property owners will be able to litigate their claims in federal court – a fact this Court acknowledged in *San Remo*. *Id.* at 346-47.

The Ninth Circuit's procedural gymnastics to avoid reaching the merits of Takings Clause claims have reached almost legendary status. *See, e.g.*, *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1080 (9th Cir. 2012) (substituting its earlier opinion on the

[2] The Ninth Circuit "has considered and rejected futility arguments on theories of undue delay, the futility of returning to the same rent control board if a writ is granted by the state court, and the failure to provide compensation for losses incurred while *Kavanau* proceedings are pending." *Colony Cove*, 640 F.3d at 958; *see also Equity Lifestyle Props.*, 548 F.3d at 1192 (rejecting claims that the *Kavanau* process does not provide an adequate remedy).

merits with a jurisdictional holding alleviating the court of the need to reach the merits – a jurisdictional holding that this Court rejected when it unanimously reversed the judgment), *rev'd*, 133 S. Ct. 2053 (2013).

The myriad Ninth Circuit procedural hurdles that often prevent full adjudication of the merits of takings claims perhaps explain why this Court has been waiting for twenty-one years for an opportunity to definitively resolve the standard for regulatory takings challenges to California's draconian rent and vacancy control ordinances regulating mobilehome parks. *See Yee*, 503 U.S. at 538. This Court should take this case rather than wait another twenty years to settle this issue, particularly in light of the district court's important factual findings that the city's stated purposes were entirely pretextual, *see* Pet. App. 71a-81a.

B. This case was fully adjudicated on the merits, and is therefore a rare vehicle for addressing important unresolved issues.

This case made it through the gauntlet of procedural hurdles to a trial and a decision on the merits, and to appellate review on the merits. The petition correctly asserts that "[i]f left to stand, the Ninth Circuit's decision will likely mean that there will never be another fully-litigated regulatory taking case from that circuit for this Court to review, because all cases will be dismissed prior to trial regardless of their

merit." Pet. 2-3. This is true not just because the Ninth Circuit's opinion forecloses challenges to unconstitutional rent and vacancy control on the merits, but also because the procedural barriers to this Court's review have meant that this Court has not had the opportunity to address this issue in the twenty-one years since *Yee*.

Like many cities, San Rafael enacted its rent control ordinance in the 1980's. *See* Pet. App. 37a. In 1993, the city added vacancy control. *Id.* at 39a. The *only reason* that the petitioners were able to bring a facial challenge to the rent and vacancy control ordinance in 2000 is that San Rafael substantially amended the ordinance in 1999. *Id.* at 41a-42a, 98a ("[T]he shift away from a regime under which the rental rate increases largely keep up with inflation to one under which cumulative rent increases fall progressively further behind the overall rate of inflation means that . . . . the Ordinance, as amended in 1999, represented a fresh injury subject to facial challenge."). Although many mobilehome parks in the Ninth Circuit are subject to unconstitutional rent and vacancy control ordinances, it is only because San Rafael substantially amended its ordinance to shift *even more* of the mobilehome park's equity from the petitioners to their then-tenants that the petitioners' facial challenge was not time-barred.

The constitutionality of restrictive ordinances like the one at issue here is of great concern to large and small-business owners alike. After twenty-one years "awaiting a case in which the issue was fully

litigated below," *Yee*, 503 U.S. at 538, *amici* urge the Court to decide the issue now.

If this Court does not seize the opportunity to determine whether the rent control scheme at issue here constitutes a regulatory taking, it may be years until another property owner makes it through the almost-insurmountable procedural hurdles to a full trial and a decision on the merits. Further, without this Court's guidance, the Ninth Circuit's misinterpretation of *Penn Central* will remain the law of the circuit and no regulatory takings claim based on a rent control ordinance could possibly succeed. As the petition explains, "the Ninth Circuit created a direct conflict with this Court's decisions establishing that a taking may be found even when regulation does not eliminate all economically beneficial use of a property." Pet. 16.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

HORVITZ & LEVY LLP
JEREMY B. ROSEN,
Counsel of Record
STEVEN S. FLEISCHMAN
LISA M. FREEMAN
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800
jrosen@horvitzlevy.com
sfleischman@horvitzlevy.com
lfreeman@horvitzlevy.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Manufactured Housing Institute, National Federation of Independent Business

KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

KAREN R. HARNED
LUKE A. WAKE, *Of Counsel*
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048

Counsel for National Federation of Independent Business