Docket No. 06-56306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,
Plaintiffs and Appellants,

vs.

CITY OF GOLETA, a municipal corporation,
Defendant and Appellee.

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

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND APA CALIFORNIA IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae League of California Cities, California State Association of Counties, and APA California aver that they are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporation.

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INTRODUCTION

The League of California Cities ("League"), the California State Association of Counties ("CSAC"), and APA California ("APACA") submit this amicus curiae brief in support of the petition for rehearing and rehearing en banc filed by the City of Goleta ("City"). As described in the petition and in this brief, the majority made a radical departure from established regulatory takings doctrine in concluding that the City's mobilehome rent control ordinance ("RCO"), on its face, effected a taking of private property.

First, neither the District Court nor this Court has jurisdiction to consider Plaintiffs-Appellants' ("Park Owners") takings claims because there is no justiciable Article III "case or controversy" here. The Park Owners never sought just compensation from the California courts, and thus their claim for a taking *without* just compensation has not accrued. The majority's view that this ripeness requirement is merely prudential and subject to waiver conflicts with Supreme Court and Ninth Circuit precedent that declares the requirement to be jurisdictional.

Second, the Park Owners have no standing to bring this action against the City. Neither the Park Owners nor the City are proper parties to this action. The Park Owners purchased their mobilehome park long after the enactment of the RCO. Because they challenge the RCO on its face, any injury was complete upon

the RCO's enactment and thus the Park Owners have suffered no injury in fact. Moreover, any injury caused by the RCO is not "fairly traceable" to the City: the County of Santa Barbara enacted the RCO many years before the City incorporated. Accordingly, any injury was the result of independent action of a party not before this Court.

Finally, assuming the Court did have jurisdiction of the case, the majority improperly applied the multi-factor, ad-hoc takings test established by *Penn Central Transportation Co. v. City of New York,* 484 U.S. 104 (1978). The City and other amici capably describe many of these flaws. We write to emphasize that the majority misapplied *Penn Central*'s "economic impact" factor by focusing on the RCO's impact on the Park Owners' profits from a single use of property, rather than on its impact to the use and value of the property as a whole.

The majority opinion conflicts with numerous decisions of this Court and the Supreme Court and thus profoundly unsettles takings law. Moreover, the opinion threatens to give a windfall to the Park Owners, who paid a reduced price for their park thanks to the existence of the RCO. Both City taxpayers, who would pay any judgment, and the park residents, who paid a premium for their homes in reliance on the RCO's protections and who would lose that premium in the likely event that the City rescinds the RCO to mitigate its damages, would be the victims of this

windfall. Consideration by the full Court is necessary to secure uniformity of the Court's decisions and resolve a panoply of questions of exceptional importance.

STATEMENT OF INTEREST

The League is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. CSAC's membership consists of all 58 California counties, which together provide a vast array of municipal services to the State's residents, including roads, parks, law enforcement, emergency response services, and public health and welfare delivery. APACA, the largest of the 46 chapters of the American Planning Association, is a network of 6,500 professional planners, planning commissioners, and elected officials committed to urban, suburban, regional, and rural planning in California. Amici monitor litigation of concern to local governments and land use planners and seek to participate in those cases of statewide or nationwide significance. Amici have determined that this is such a case.

More than 100 of the cities and counties that Amici represent have adopted some form of mobilehome rent control and thus will be directly affected by the majority opinion. These jurisdictions have determined that mobilehome owners are in a uniquely vulnerable position warranting enactment of ordinances to protect their investment in their homes.

Moreover, although nominally about mobilehome rent control, the majority opinion's significance extends far beyond that field. The opinion fundamentally reorients and expands regulatory takings doctrine in ways that will subject local governments to facial takings challenges to, and thus significant liability for, a wide variety of land use regulations. In doing so, the majority opinion is likely to substantially increase lawsuits filed against local governments and attendant litigation costs. These increased risks of liability and litigation costs will chill local governments' exercise of their police power to protect public welfare both in and beyond the context of rent control.

Amici are concurrently filing a motion for leave to file an amicus brief in support of the Petition, pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29-2(b) of the Ninth Circuit Rules.

ARGUMENT

I. The Park Owners' Takings Claim Is Unripe Because They Have Not Sought Just Compensation in State Court.

A takings claim is not ripe for federal review until after the plaintiff has first sought just compensation under the procedures established by state law for bringing a takings or inverse condemnation claim (the "state compensation requirement"). *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-95 (1985). Although the parties agree the Park Owners did not seek compensation in state court, Slip Op. at 13823, the majority nonetheless found that

the City waived the ripeness defense. This holding directly conflicts with the governing law, which establishes that the state compensation requirement is jurisdictional and thus beyond the power of the parties to waive or forfeit.

Because "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation," a federal takings claim does not accrue "until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Williamson County,* 473 U.S. at 194-95. Accordingly, this Court has repeatedly found that the state compensation requirement is jurisdictional and requires dismissal where a takings plaintiff has not sought compensation in state court. "Ripeness is more than a mere procedural question; it is determinative of jurisdiction." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990); *accord W. Linn Corporate Park LLC v. City of West Linn,* 534 F.3d 1091, 1100, 1102-03 (9th Cir. 2008); *Vacation Vill., Inc. v. Clark County, Nevada,* 497 F.3d 902, 913 (9th Cir. 2007); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003); *Jones Intercable of San Diego, Inc. v. City of Chula Vista,* 80 F.3d 320, 323-24 (9th Cir. 1996); *see also Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 406 (9th Cir. 1996) ("[N]o constitutional violation occurs until the state refuses to justly compensate the

property owner.").[1] Accordingly, the state compensation requirement compels dismissal on a court's own motion—regardless of whether the defendant raises a ripeness defense. *See Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996).

The majority ignores this wealth of precedent and chooses instead to treat the state compensation requirement as "merely 'prudential.'" Slip Op. at 13826. In support of its position, the majority cites two Supreme Court cases and two Ninth Circuit cases, none of which supports its conclusion.

Contrary to the majority's suggestion, Supreme Court takings jurisprudence does not hold that the state compensation requirement is only prudential. Indeed, neither of the two cases the majority cites—*Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725 (1997)—had occasion to address the state compensation requirement. Because *Lucas* came to the Supreme Court on certiorari to the South Carolina Supreme Court, Mr. Lucas plainly satisfied the requirement. Although *Lucas* did refer to the "prudential" ripeness requirements of *Williamson County,* its discussion was limited to whether the plaintiff had satisfied *Williamson County*'s

[1] Other circuits similarly find a lack of subject matter jurisdiction where plaintiffs fail to satisfy the state compensation requirement. *See, e.g., Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569 (6th Cir. 2008); *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007).

distinct "final decision" ripeness requirement, which requires that the defendant regulatory body have reached a final determination about how the property may be developed. *Lucas*, 505 U.S. at 1011. There was no discussion of the state compensation requirement, much less a holding that the requirement was not jurisdictional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386-87 n.5 (1992) (it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned").

Suitum similarly did not address the state compensation requirement. Like *Lucas*, it only considered whether the property owner's action was ripe under *Williamson County*'s final decision requirement. 520 U.S. at 734. The Court further expressly acknowledged that it did "not decide whether *Williamson County's* 'state procedures' requirement has been satisfied in this case." *Id.* at 734 n.8. *Suitum* did not involve a challenge to a state agency action and therefore the state compensation requirement arguably was entirely inapplicable. The Tahoe Regional Planning Agency, a multistate agency created by interstate compact, did not provide its own compensation procedures. *Id.*

The majority's ripeness holding is also flatly inconsistent with the Supreme Court's recent decision in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005). The plaintiffs there had asserted takings claims in

federal court, and this Court abstained as to some of the claims and affirmed dismissal of others based on the state compensation requirement. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1106 (9th Cir. 1998). In the Supreme Court, the plaintiffs argued that, because *Williamson County* had "forced" them into the state forum to ripen their as-applied takings claims, they should have been able to "reserve" those claims under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), and then return to litigate them in federal court after the state court denied them compensation. 545 U.S. at 338.

The Supreme Court roundly rejected the argument, holding that because their as-applied takings claims were unripe, they "*were never properly before the District Court,* and there was no reason to expect that they could be relitigated in full [in federal court] if advanced in the state proceedings." *Id.* at 341 (emphasis added). Because an *England* reservation is limited to cases in which "a plaintiff *properly invokes* federal-court jurisdiction in the first instance on a federal claim," *San Remo*, 545 U.S. at 340 n.21 (quoting *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980)), the Court found *England* did not apply to the plaintiffs' as-applied takings claims, which "were never properly before the District Court because they were unripe." *Id.* at 344. This conclusion is squarely inconsistent with the majority's conclusion here that the state compensation requirement is only prudential.

This Court's cases likewise do not find the state compensation requirement to be prudential. First, the majority errs in suggesting that this Court in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), could only have reached the merits of the plaintiffs' takings claim if the state compensation requirement were prudential. Slip Op. at 13829. In fact, the *Richardson* plaintiffs asserted two distinct takings claims: that the challenged rent control ordinance (1) took their property without payment of just compensation and (2) failed to "substantially advance a legitimate government interest." *Richardson*, 124 F.3d at 1164, 1166. Crucially, this Court did hold that the state compensation requirement compelled dismissal of the first claim. *Id.* at 1160-61. By contrast, it reached the merits of only the plaintiffs' "substantially advances" claim, because denial of just compensation was not an element of the claim. *See id.* at 1165. Because the Supreme Court in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), repudiated the "substantially advances" theory, the only takings claim in this case is the very claim that *Richardson* held to be unripe based on the state compensation requirement.

Second, this Court's decision in *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), also fails to show that the state compensation requirement is merely prudential. The plaintiffs there had attempted to seek compensation in state court, but the city removed the case to federal court. *Tapps Brewing, Inc. v. City of*

Sumner, 482 F. Supp. 2d 1218 (W.D. Wash. 2007). The District Court found that "[s]ince Plaintiffs have pursued an inverse condemnation action in Washington state court (Dkt. 5-2, at 3), their takings claim . . . is ripe for adjudication in this Court." *Id.* at 1227. Whatever the propriety of the District Court's conclusion, this Court did not address the state compensation requirement on appeal. 548 F.3d at 1224. Moreover, neither *McClung* nor the cases on which it relied—*Suitum*, *Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001), and an unpublished memorandum disposition—included any analysis to support a conclusion that the state compensation requirement is prudential. *See Weinberg*, 241 F.3d 746, 752 n.4 (9th Cir. 2001) ("We assume without deciding that the Federal takings claim is ripe.").

Nevertheless, if the holding in *McClung* did in fact evidence some real "tension" in this Court's decisions about the jurisdictional nature of the state compensation requirement, *see* Slip Op. at 13828, the Court would have all the more reason to grant rehearing en banc to "secure . . . uniformity of the court's decisions" on this important topic. Fed. R. App. P. 35(a)(1).

II. The Park Owners Have No Standing to Sue.

This case is unusual, if not unique, because neither the party injured by the challenged action, nor the author of that action, is before the Court. As a result, two of the three requisites of Article III standing are missing: (1) the Park Owners

have suffered no "injury in fact" that (2) was caused by, or "fairly traceable to," the City's conduct rather than "the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. The Park Owners Have Suffered No Injury in Fact.

Any injury caused by the RCO was perfected by its original enactment in 1987, ten years before the Park Owners purchased the property "at a price presumably reflecting the impact of the rent control on the prior owners, a price lower than what they would have had to pay without the rent control ordinance." Slip. Op. at 13878 (Kleinfeld, J., dissenting); *see* Order Denying Motion for Summary Judgment (Apr. 4, 2006) at 6 (finding uncontroverted evidence that the Park Owners paid a lower price for the property because of the RCO). A facial takings claim assumes that the "mere enactment" of the measure effects a taking. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987); *Hacienda Valley Mobile Estates*, 353 F.3d at 655; *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), *overruled on other grounds in WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). "[T]he harm is singular and discrete, occurring *only* at the time the statute is enacted." *Carson Harbor*, 37 F.3d at 476 (emphasis in original) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)).

This Court in *Carson Harbor* therefore found no injury in fact where a mobilehome park owner mounted a facial challenge to a rent control ordinance enacted before the plaintiff purchased the park. *Id.*; *see also Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 (9th Cir. 2008) (relying on *Carson Harbor* to deny standing). Having purchased the park after the RCO was enacted, the Park Owners here likewise suffered no injury.

Contrary to the majority's intimation (Slip Op. at 13821-22), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), did not upend *Carson Harbor*'s holding. *Palazzolo* did not even mention standing. Indeed, Mr. Palazzolo's injury was patent: he brought an as-applied challenge, not a facial challenge, and the taking and injury occurred *after* he acquired the property, when his development application was rejected.[2] *Id.* at 626; *see Daniel v. County of Santa Barbara*, 288 F.3d 375, 383-84 (9th Cir. 2002). *Palazzolo* therefore could not have overruled *Carson Harbor.*

The majority errs in concluding that the City's readoption of the RCO in 2002, without change, caused a new injury to the Park Owners. Slip Op. at 13822. While "mere enactment" of a measure *can* effect a taking, "[t]he mere existence of

[2] Furthermore, the change in ownership in *Palazzolo* was more nominal than substantive, as Mr. Palazzolo had been the sole shareholder of the corporation that owned the property when the state enacted the regulation that was later applied to his property. 533 U.S. at 613.

a statute ... is not sufficient to create a case or controversy within the meaning of Article III." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). Rather, the plaintiff must show that the challenged measure has a real-world effect on the plaintiff's interests: there must be an injury *in fact*. *See Lujan*, 504 U.S. at 560 (injury must be "concrete and particularized"); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (injury must be "distinct and palpable"); *Carson Harbor*, 37 F.3d at 475 (requiring "actual injury" that is "real and immediate").

There is no suggestion in the majority opinion that the Park Owners suffered any injury *in fact* from the City's ministerial readoption of the RCO. Apart from a brief gap during a single day—of which the Park Owners may not have even been aware—the RCO remained in effect without substantive change after the City incorporated.[3] Accordingly, the Park Owners suffered no new injury from the City's reenactment of the RCO. *See De Anza Props. X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086-87 (9th Cir. 1991) (park owners suffered no new injury when County amended mobilehome rent control ordinance to delete sunset

[3] Indeed, Amici are aware of no evidence in the record to show that the ephemeral gap in the RCO's applicability or the RCO's reenactment had any impact whatsoever. Indeed, given that reenactment was mandated by State law, *see* Cal. Gov't Code § 57376, it is hard to imagine what impact the gap could have had on the Park Owner's use of the property, its value, or the return that the Park Owners enjoyed on their investment.

provision because amendment did not alter ordinance's effect on park owners); *accord Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) (applying *De Anza*); *see also Daniel*, 288 F.3d at 384 (city's required dedication of easement perfected any taking before plaintiff acquired property, and city's post-acquisition acceptance of dedication caused no new injury).

B. Any Injury Attributable to the RCO Is Not "Fairly Traceable" to the City.

The second standing element demands "a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted).

The majority asserts that "[t]here is no question that the latter two elements of the standing inquiry" are satisfied, and further that "[t]he link between the Park Owners' injury and the RCO is . . . not 'tenuous' but 'fairly traceable' to the City's action." Slip Op. at 13820 (citations omitted). Assuming *arguendo* a "link between the Park Owners' injury and *the RCO*," however, it certainly does not follow that the injury is "'fairly traceable' to *the City's* actions," given that any injury caused by the RCO was complete when *the County* enacted the RCO years before the City incorporated.

The City's reenactment of the RCO without modification—as compelled by state law (Cal. Gov't Code § 57376)—did nothing to change the status quo. Any injury flowing from the RCO was the result of "independent action" of the County, a "third party not before the court," and thus any such injury is not "fairly traceable" to the City. *See Lujan*, 504 U.S. at 560; *see also Duquesne Light Co. v. USEPA,* 166 F.3d 609, 613 (3d Cir. 1999) (injury not fairly traceable to EPA because it had no power to disapprove plan previously adopted by Pennsylvania), *discussed in Pritikin v. Dep't of Energy*, 254 F.3d 791, 798 (9th Cir. 2001).

III. The Majority Misapplied the First *Penn Central* Factor.

The majority erroneously applied the "economic impact" factor of *Penn Central.* In its unanimous decision in *Lingle*, the Supreme Court held that its regulatory takings tests, including the *Penn Central* test,

> aim[] to identify regulatory actions that are *functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.* Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle, 544 U.S. at 539 (emphasis added).

"Functional equivalence" to direct condemnation requires that the regulation cause a severe diminution in the *market value* of real property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332, 338 (2002); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (mining regulation

could not be held to be a taking because "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question"); *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998) (plaintiffs must show the value of their property diminished so severely as a result of the regulation that the city had essentially appropriated their property for public use); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1118 (9th Cir. 1979) (examining impairment to the economic value of the property). Indeed, in a recent case, the Federal Circuit explicitly held that the trial court's *Penn Central* analysis should have focused on the regulation's impact on property value, not on profits. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1268-75 (Fed. Cir. 2009).

By contrast, the majority interpreted the "economic impact" factor of *Penn Central* as asking "what loss of potential *return on investment*, greater than zero but less than 100 percent, is significant enough to constitute a regulatory taking." Slip Op. at 13854 (emphasis added). This approach is flawed in two important respects.

First, the Takings Clause does not protect a right to profit, let alone a right to any particular level of profit. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979) (government not required to compensate every time a regulation restricts "some potential for the use or economic exploitation of private property"); *MacLeod v.*

Santa Clara County, 749 F.2d 541, 548 (9th Cir. 1984) (restricting the most valuable use of property not a taking). The majority's unprecedented lost-profits standard fails to shed light on the value of the regulated property before and after the regulation, or inform the determination as to whether the impact of a challenged regulation on property value is so extreme as to be tantamount to a direct appropriation of the property.

Second, the lost-profits analysis erroneously focuses solely on the potential profit that the landowner could realize from only a single use of the property. The majority's analysis ignores the possibility that the regulation would nonetheless allow the landowner to reap a greater profit from another, unregulated use of the property.[4] The Takings Clause neither guarantees the right to make any particular use of property, nor the right to a profit from any particular use. *See Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1985) (citing *Goldblatt*, 369 U.S. at 592) ("An ordinance may lawfully prohibit the best and most beneficial use of one's property."); *Andrus*, 444 U.S. at 66 (prohibition of the "most profitable use of appellee's property" did not constitute a taking); *Penn Central*, 438 U.S. at 130 (notion that regulatory taking is effected by denial of right to exploit particular

[4] Indeed, in theory, the market value of a property capitalizes the revenue that would be generated by the highest and best use of the property, whether or not that use is the particular use presently being made of the property. *See, e.g., Vacation Vill.*, 497 F.3d at 918.

property interest thought available "is quite simply untenable"). In essence, the majority's approach "segments" the affected property by singling out one use of the property rather than evaluating the regulation's effect on the owner's entire bundle of rights. This violates the firmly established "parcel-as-a-whole" rule:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

Tahoe-Sierra, 535 U.S. at 327, 331 (quoting *Penn Central*, 428 U.S. at 130-31; internal quotation marks omitted); *accord Andrus*, 444 U.S. at 65-66 ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); *MacLeod*, 749 F.2d at 546.

CONCLUSION

Amici urge the Court to grant the petition.

DATED: October 19, 2009 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1)

I hereby certify that, pursuant to Rule 29(d) of the Federal Rules of Appellate Procedure and Rules 29-2(c) and 32-1 of the Ninth Circuit Rules, the attached amicus brief is proportionally spaced, has a typeface of 14 points or greater, and contains less than 4,200 words.

DATED: October 19, 2009 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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The following information is for the use of court personnel:

DOCKET ENTRY ID: 7100106
RELIEF(S) DOCKETED:
motion to become amicus
DOCKET PART(S) ADDED: 6590475, 6590476, 6590477, 6590478