No. 18-1538

In the

Supreme Court of the United States

DARTMOND CHERK, *et al.*,
Petitioners,

v.

MARIN COUNTY, CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
to the California Court of Appeal

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Claremont Institute's Center for
Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Marin County imposed a $39,960 "affordable housing" fee as a condition of approving a permit to divide a residential lot, absent any finding that the fee was needed to mitigate adverse impacts of the proposed development. Alternatively, the property owner might have dedicated various non-possessory interests in the property, other land, or low-cost housing units off-site to satisfy the condition. The court below held that neither the fee nor its alternatives were subject to the unconstitutional-conditions doctrine, which requires land-use permit conditions to bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

The questions presented are:

1. Whether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits?

2. Whether the unconstitutional-conditions doctrine applies to such permit conditions when imposed legislatively, as the high courts of Texas, Ohio, Maine, Illinois, New York and Washington and the First Circuit Court of Appeals hold; or whether that scrutiny is limited to administratively imposed conditions, as the high courts of Alabama, Alaska, Arizona, California, Colorado, and Maryland and the Tenth Circuit Court of Appeals hold?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center has previously appeared before this Court in several cases addressing Fifth Amendment issues similar to those raised in this case, including *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

SUMMARY OF ARGUMENT

Like *California Building Industry Association v. City of San Jose*, '[t]his case implicates an important an unsettled issue under the Takings Clause." *California Building Industry Ass'n v. City of San Jose*, 136 S.Ct. 928 (2016) (Thomas, J., concurring in the denial of certiorari) (*CBIA*). Unlike *CBIA*, however, this case presents a ripe, as-applied challenge to the exaction scheme. There is no question that the condition imposed is not intended to resolve any public harm created by the application to split one lot into two that is at issue in this case. The fee at issue was enacted pursuant to the county's police power to resolve a public

---

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

need without resort to the politically troublesome problem of diverting tax revenue from more popular uses.

Moreover, the problem that the county claims to be addressing is one of its own creation. Indeed, exactions that raise the cost of developing new housing units inevitably result in higher rather than lower housing costs and help to further restrict the supply of affordable housing, thereby exacerbating the problem. California cities and counties may be free to enact legislation that results in the lack of affordable housing. They may not, however, demand exactions of land, houses, or money from property owners as a condition of obtaining a development permit when that exaction is unrelated to any impact caused by the development. Such a condition is an unconstitutional condition and it does not matter if the condition is imposed by a regulator or a legislative body.

This case is an example of California's apparent long-standing and official policy of antipathy toward individual rights in property. This Court has reviewed (and reversed) California state court decisions that purported to withdraw the protections of the Takings Clause from California property owners and that gave the state the power to confiscate property without compensation as a condition for a permit approval. These state policies are antithetical to the notion of individual liberty enshrined in the federal constitution. This Court is called on once again to reject California's view that the state can demand property in exchange for a development permit as a simple exercise of its police power.

REASONS FOR GRANTING REVIEW

I. The Housing Affordability Crisis in California was Created and is Sustained through Government Land Use Policies.

There is no doubt that California has a housing affordability problem. There is also no doubt that it is a problem of local government's own making. Three months before the California Supreme Court issued its decision in *California Building Industry Association v. City of San Jose*, 61 Cal.4th 435 (2015), the California Legislative Analyst's Office issued a comprehensive report entitled "California's High Housing Costs, Causes and Consequences." The report confirms that the cost of housing in California – especially in the urban coastal areas like West Hollywood – far exceeds the cost of housing elsewhere in the nation.

The most striking finding in the Legislative Analyst's report is the cause of this disparity in housing costs. High building costs due to regulation and development fees, though significant when compared to such costs elsewhere, are only a small part of the problem. *Id*. at 14. The national average for government fees on development is about $6,000 per home compared to more than $22,000 per home in California. *Id*. The real culprit, however, is that "far less housing has been built in California's coastal metro areas than people demand." *Id*. at 10. This lack of housing supply is a direct result of growth controls, zoning regulations, and general opposition to new development in the coastal metropolitan areas like Marin County. *Id*. at 15-17.

Rather than addressing the policies that created this crisis of housing affordability, Marin County is ordering property owners who want to divide their lots to either pay a fee to the city or record a deed restriction reserving some of the property for sale at below market rates. In the case of the Cherks, this deed restriction would affect one-half of the property they own.

New housing does not contribute to the problem, it contributes to the solution. This Court should grant review to rule that property exactions, even those imposed legislatively, must be related to a harm created by the property owner.

II. California's Antipathy Toward Individual Rights in Property Is Contrary to the Concept of Individual Liberty Enshrined in the Constitution.

California has a long-standing antipathy toward the notion of individual rights in private property. Since at least 1949 the state has clung to the view that the "police power" allows it to demand real estate in exchange for a building permit. *See Ayres v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 42 (1949). The California Supreme Court reasoned in *Ayers* that there was no taking involved because the developer sought the "advantages" of a subdivision and the state had the sovereign power to compel the property owner to "yield to the good of the community" in exchange for those advantages. *Id*.

The California Supreme Court reaffirmed the holding of *Ayers* in *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633 (1971). There the court ruled that local government could demand that home

builders give up a portion of their property for recreational facilities even if the development did not create a need for those facilities. The court ruled that the exaction "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions." *Id*. at 638. The court based its ruling on the finding that "[u]ndeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure." *Id*. at 641. In the view of California, this limited resource belongs to the government rather than the property owner.

In later cases, the California Supreme Court sought to further protect cities from the demands of the compensation requirement of the Takings Clause. Even where the exaction is unconstitutional, the California court ruled that no compensation was available. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272 (1979), *aff'd*, 447 U.S. 255 (1980), abrogated by *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

This case continues this California tradition of resistance to the constitutionally guaranteed individual liberties of ownership and use of property. The issue is not the wisdom of the city policy. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). It is instead whether the city can, by legislation, demand specific property as a condition of permit approval where that condition has no relation to any public harm created by the development.

The lower court ruled that the county's exaction is not subject to constitutional scrutiny because it was imposed legislatively, rather than as the result of an

administrative process. In California, individuals are first forced to apply to the local government for permission to exercise their constitutionally guaranteed liberties, and then told that permission must be purchased with land or money, despite the fact that in *Nollan*, this Court ruled that a permit condition that does not serve the same purpose as a development ban is "'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837.

Such a result is at odds with the Constitution. The Takings Clause prohibits uncompensated takings by government, regardless of which branch of government does the taking. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 715. Leveraging its permit authority to shift the cost of unrelated public needs to select property owners is not a constitutionally permissible alternative for the city. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). The police power is not all encompassing. Indeed, the liberties enshrined in the Bill of Rights are designed precisely to limit the exercise of the power of government.

III. The Original Understanding of the Takings Clause Demonstrates that it was meant to Protect against Both Executive and Legislative Encroachments on Individual Liberty.

The Fifth Amendment did not arise in a vacuum. Rather, it represents a culmination of hundreds of years of legal history and precedent going back to at least the signing of the Magna Carta in 1215. As James Ely has noted, "Colonial appreciation of prop-

erty rights was strongly shaped by the English constitutional tradition. Americans associated property rights with the time-honored guarantees of Magna Carta (1215)." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 13 (Oxford Univ. Press, 3rd ed. 2008).

One of those guarantees is the principle that property shall not be taken by government without just compensation paid to the owner. Three separate clauses affirm that government may only take property from its citizens by obtaining their consent or providing compensation.

Translated into English from the original Latin, Chapter 28 directly addresses the requirement of just compensation for the taking of property, providing:

> No constable or bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

Magna Carta, Chapter 28 reprinted in John S. McKechnie, Magna Charta, A Commentary on the Great Charter of King John (Lawbook Exchange, 2nd Ed. 2000) at 329

Drawing upon the declarations of the Magna Carta, English law evolved to the point that "[b]y the seventeenth century, Parliament regularly provided compensation when property was taken." Ely at 23. Thus, by the mid-eighteenth century, William Blackstone was able to declare: "So great moreover is the regard of the law for private property, that it will not

authorize the least violation of it." William Blackstone, Commentaries on the Laws of England (1765) 1:135 (Univ. of Chicago Press 1979) at 135.

This protection of individual liberty applied to both legislative and executive encroachments:

> In this and similar cases *the legislature alone* can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a *full indemnification* and equivalent for the injury thereby sustained. … All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Id. (emphasis added).

This development is consistent with the English liberal understanding of a natural right to property. As John Locke articulated: "[T]he preservation of property being the end of government … it is a mistake to think that the supreme or legislative power … can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure." John Locke, Second Treatise of Government (1681), reprinted in Political Writings (David Wootton, ed., Hackett Publishing Company: 2003) at 332-333 .

In America, the transformation of just compensation from an unenumerated but understood natural

right protected under English common law to specific, positive law may be understood as a consequence of increasing distrust of the ability and will of the legislatures to protect property rights.

For example, owing to historical circumstances, Vermont began as part of New Hampshire, but was later transferred to New York. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis Goes Too Far*, 49 Am. Univ. L. Rev. 181, 211 (1999). Following this transfer, many landowners who were granted land by New Hampshire found their claims disregarded by the governor of New York, with the support of the legislature. *Id*.

The people of Vermont explicitly cited the actions of the legislature of New York in dispossessing citizens of their land as a central grievance when Vermont declared independence from New York early in the Revolution. Constitution of Vermont, July 8, 1777, Preamble reprinted in VI Francis N. Thorpe, The Federal and State Constitutions (William S. Hein & Co.) (1909) at 3738 ("[W]hereas, the legislature of New-York, ever have, and still continue to disown the good people of this State, in their landed property, which will appear in the complaints hereafter inserted …"). In order to protect against future encroachments, the people of Vermont proposed a Constitution that asserted "private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vermont Constitution, Ch. I, § II, *supra* at 3740. Concerns about the actions of the legislature were part and parcel of the first state constitution to explicitly require just compensation.

See William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 703 (1985) ("The development of Vermont political ideas about property is clearly linked to the actions of the New York legislature.").

The Massachusetts Constitution also recognized that compensation was required when the legislature approved the taking of property:

> [N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Massachusetts Constitution, Part the First, Art. X, (1880) reprinted in III Francis N. Thorpe, *supra*, at 1891.

The Massachusetts Constitution is significant because it makes clear that compensation is required in addition to the consent of the legislature, not in lieu of it. This is not a historical accident. The Massachusetts Constitution itself arose at a time when tensions between rural western parts of the state and eastern authorities reached "near rebellion" due to concerns over the development of debtor-creditor laws. Treanor, 94 Yale L.J. at 706 n. 65 (citing S. Patterson, Political Parties in Revolutionary Massachusetts 136-137 (1973)). These tensions were so intense that an earlier proposed constitution for Massachusetts was

rejected in part for its insufficient protections of private property. *See* Treanor, 94 Yale L.J. at 706; Gold, 49 Am. Univ. L. Rev. at 211-213.

Conduct of state legislatures during the Revolutionary War period also sowed distrust in the ability of legislatures to protect property rights. See Treanor, 94 Yale L.J. at 704-705. During the war, there were "wide-spread depredations of property held by both Loyalists and creditors," Ely at 26. "Sweeping confiscation and sequestration measures," Ely at 41, resulted in the seizure of property belonging to British loyalists and merchants valued at one-tenth of the value of all real property in the country. William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 790 (1995).

The natural right to be free from government-initiated extortions or expropriations of property without just compensation was generally recognized and protected by English common law going back to the Magna Carta. This understanding was incorporated in the Takings Clause of the United States Constitution. Against this backdrop of concern for legislative disregard for property rights, it would be ahistorical to assert, as California has, that the legislature is properly held to a lower standard when it takes property than an administrative body. A taking is a taking, regardless of whether it is through specific determination or legislative mandate.

IV. Constitutionally Protected Rights in Property Preclude Local Governments from Leveraging their Permit Power to Exact Land and Money for General Public Needs.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Takings Clause in the proposed Bill of Rights, based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hitchcock, ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first federal level analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS, (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id.*, at 104.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat.1 (1776). The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

There is nothing in the history or original understanding of the Takings Clause that exempts legislatures from the general command that government

may not take property for public use without just compensation. Precisely the opposite is true. The founding generation was just as concerned about legislatively enacted confiscations of property as confiscation by executive officials. The city and the court below concede that the exaction at issue here is unrelated to any need or detriment caused by the development. This is the case the Court needs to resolve the conflicts in lower court rulings on legislative exactions.

CONCLUSION

The Court should grant review in this case to resolve the important and unsettled issue under the Takings Clause" the Justice Thomas outlined in his opinion concurring in the denial of certiorari in *California Building Industry Association*, *supra*.

July 2019

Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Claremont Institute's Center for
Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae