No. 22-1074

In the

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

On Writ of Certiorari to the
California Court of Appeal,
Third Appellate District

BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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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, including the principle that rights in private property are the foundation of individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *California Building Industry Ass'n v. City of San Jose*, 577 U.S. 1179 (2016); and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), to name a few.

SUMMARY OF ARGUMENT

The issue in this case is not whether a legislatively imposed condition is subject to the unconstitutional conditions test. This Court has long held that statutes and regulations can be struck down as imposing unconstitutional conditions. Instead, the issue is whether the Takings Clause will continue to be "relegated to the status of a poor relation" to other protections of the Bill of Rights. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

This Court has noted that the Framers of the Constitution considered property rights to be the foundation of individual liberty. Property rights are actually

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[1] 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 *amicus* made a monetary contribution to fund the preparation and submission of this brief.

a group, or bundle, of rights surrounding the ownership of property. They include, at the core, "the right to possess, use and dispose of" property. *United States v. General Motors*, 323 U.S. 373, 378 (1945). As far as constitutional rights go, however, the right to "use" property has been significantly eroded since the adoption of the Fifth Amendment. Unlike other provisions of the Bill of Rights, the courts have tolerated a "prior restraint" on the exercise of this right to "use" one's own property. The owner of the property must first seek the permission of the government to exercise his natural right to use the property. Some cases hold that the constitutionality of the restriction or denial of use should be measured on whether the program is "merely" an adjustment of the "benefits and burdens of economic life to promote the public good." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104. 124 (1978). The Court has never suggested that freedom of speech, press, or any of the other rights enshrined in the Bill of Rights can be treated so cavalierly.

It might be argued that this system of prior restraint is tolerated simply as a means of protecting neighboring property owners and the larger community from injury. But the cities and states have used their prior restraint power to impose exactions and fees unrelated to the proposed use of the property. The Court should rule that the Due Process Clause protects against this abuse.

ARGUMENT

I. Individual Rights in Property Are at the Foundation of Individual Liberty.

One of the founding principles of this nation was the view that liberty and individual rights in property are inextricably intertwined. *Cedar Point Nursery*, 141 S.Ct. at 2071; St. George Tucker, *On the Several Forms of Government*, in View of the Constitution and Selected Writings, at 41 (Liberty Fund (1999). Quoting John Adams, this Court in *Cedar Point Nursery* noted: "'[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point Nursery*, 141 S.Ct. at 2071 (quoting John Adams, *Discourses on Davila*, *in* 6 The Works of John AdamS 280 (Charles Francis Adams ed., 1851)).

This is a view well-documented in the writings of the founding generation. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, *Boston Gazette*, Feb. 22, 1768, at 1. This widespread association of liberty and property is part of our common law heritage.

In his 1765 Commentaries on English Law, William Blackstone explained the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution." William Blackstone, 1 Commentaries on the Laws of England 135 (Univ. of Chicago Press 1979) (1765).

John Locke, who influenced the framers of our Constitution, taught that the right to own private property was a natural right that preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government* 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

This view of property and liberty was at the root of the revolution and, later, the Constitution. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* Present Dispute with America 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, borrowing heavily from John Locke. Ely, PROPERTY RIGHTS, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life, liberty, and estates." Jefferson substituted "pursuit of happiness" for "estates," but this should not be misun-

derstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, Property Rights, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in the formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, those policies strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 The Papers of Alexander Hamilton 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 The Records of the Federal Convention of 1787 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling – property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 Collected Works of James Wilson ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007).

The founding generation believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, An Examination into the Leading Principles of the Federal Constitution 58-61 (Oct. 10, 1787).

The individual right of "property" is not simply one of ownership. "Property," as protected by the Fifth Amendment, refers to a bundle of rights. *Kaeser*

Aetna v. United States, 444 U.S. 164, 176 (1979). Blackstone defined the idea of property as "'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" *Cedar Point Nursery*, 141 S.Ct. at 2072 (quoting William Blackstone, Commentaries, *supra* 2:2). It is the right to *use* the property that lies at the foundation of "sole despotic dominion."

II. The Core of the Natural Right to Property Protected by the Fifth Amendment Is the Right to Use that Property.

The rights in property considered essential to liberty are not simply ownership or the ability to sell land to a neighbor. The right to put the property to use is the key to liberty. *See* John Locke, Second Treatise §§ 31-45, *supra*. Blackstone also noted that rights in property were rooted in its use. William Blackstone, Commentaries, *supra*, 1:134. This Court echoed those sentiments, noting that the Constitution's protection of the individual right to own and use property "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr*, 582 U.S. at 394.

This was the view of the founding generation. Gouverneur Morris argued that a free society must recognize in "every Citizen … the Right freely to use his Property." Gouverneur Morris, *Political Inquiries*, in 1 The Founders' Constitution 588 (Philip B. Kurland and Ralph Lerner, eds. 1987). James Madison insisted that the United States could not allow even indirect interference with these vital individual rights to own and use property. James Madison, *Property*, in 1 The Founders' Constitution 598.

The idea that "use" of property is at least part of what is protected by the Fifth Amendment finds support in the decisions of this Court. For instance, in *United States v. Causby*, 328 U.S. 256 (1946), this Court noted that the protected interest is "[t]he owner's right to possess and exploit the land—that is to say, his beneficial ownership of it." *Id.* at 262. The beneficial ownership at issue in *Causby* was the use of the land to raise chickens, a use that was destroyed by low-altitude flights over the land. *Id.* at 258.

Destruction of "use" was also recognized as a Taking in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 179 (1871). While more recent cases continue to recognize "use" as the protected interest under the Takings Clause, this Court has diminished the constitutional right. Now, the Court looks at the owner's "reasonable investment backed expectations" regarding the use. *See Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 39 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). Worse, the Court has even weighed the right of use against the "government's 'power to adjust[t] rights for the public good.'" *Murr*, 582 U.S. at 394 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Rather than protecting a natural right to own, use, and dispose of property, some cases have recharacterized the Fifth Amendment's Takings Clause to simply "bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Even with this dilution of the right sought to be protected by the Framers and Ratifiers, however,

there is no basis for allowing state and local governments to exploit their power of prior restraint over the exercise property rights to assess unrelated fees and exactions.

III. Constitutionally Protected Rights in Property Preclude Cities and States from Leveraging their Permit Power to Exact Land and Money for Public Needs Unrelated to Any Harm Created by the Property Use.

This Court has long recognized that state benefits (in that case, a tax deduction) cannot be conditioned on waiver of constitutional rights. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). This ruling was echoed in *Keyishian v. Board of Regents*, where the Court noted that public employment could not be subjected to a condition that the employee give up his First Amendment rights. *Id.* at 606. This Court has remained steadfast in rejecting the idea that government may condition a benefit – even one that the government has no obligation to provide – on the surrender of constitutional rights. *See, e.g.*, *Agency for Intern. Development v. Alliance for Open Society*, 570 U.S. 205, 213 (2013); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974). The issue is not whether an individual has a right to the particular government benefit. But the government may not deny that benefit "on a basis that infringes his constitutionally protected interests. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

This principle applies with equal force to individual rights in property. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005). In applying these precedents to local government demands for exactions in exchange for a permit, this Court noted that individual rights in property could not be "relegated to the status of a poor relation" to other constitutionally protected individual liberties. *Dolan*, 512 U.S. at 392. Thus, a property owner could not be required to give property to the government in exchange for permission to build on his property. Any such condition, this Court ruled, must be "roughly proportional" to some adverse impact created by the property use at issue. *Id*. at 391.

This principle applies even when the government may lawfully deny the permit. *Koontz*, 570 U.S. at 607-08. When "someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a government benefit is a constitutionally cognizable injury." *Id*. at 607.

Here, the County of El Dorado seeks to impose a "traffic impact" fee of more than $23,000 as a condition of granting permission to petitioner to build one small house on his property. There is no showing that this fee in any way relates to any burdens on the current roads that would be created by this small building project. Yet, the County conditions petitioner's right to use his property on the payment of this fee. This is not something that the Court has tolerated as a condition on the exercise of other constitutional rights. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987) (State may not impose differential tax on the press) and *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460

U.S. 575, 581-82 (1983) (State may not impose different use tax on newsprint and ink necessary for newspaper production than the tax on other goods).

Nor can the state or local government impose a condition that limits the exercise of a constitutional right as a condition to obtain a parade permit. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-74 (1995) (State may not condition parade permit on the waiver of the right to choose what to say). And yet, only in the context of property rights has the government been able to get away with imposing unrelated conditions, costs, and waiver of constitutional rights on the exercise of that constitutionally protected right. Clearly, then, the natural right to own and use property protected by the Fifth Amendment remains a distant and distinctly poor relation to the other rights protected by the Bill of Rights. This case provides the Court with the vehicle to begin a return to the protection of the rights enshrined in the Takings Clause.

CONCLUSION

This Court has recognized that property rights, including the right to use the property, are the foundation of individual liberty sought to be protected by the founding generation. El Dorado County and other state and local governments seek to condition this fundamental liberty on exactions and fees that are not related to the use of the property at issue. The Court should rule that the Due Process Clause forbids unrelated fees and exaction on the exercise of this constitutional right.

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