No.

IN THE
Supreme Court of the United States

SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioner,

v.

ORANGE COUNTY TRANSPORTATION AUTHORITY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment's Takings Clause guarantees just compensation when the government forces a privately owned utility to relocate its facilities to make way for a public transit project.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioner Southern California Edison Company was a plaintiff in the district court and an appellant in the court of appeals. Southern California Gas Company was also a plaintiff in the district court and an appellant in the court of appeals. Respondent Orange County Transportation Authority was a defendant in the district court and an appellee in the court of appeals.

2. Petitioner Southern California Edison Company is a wholly owned subsidiary of Edison International, a publicly traded company (NYSE: EIX). No company has an interest of 10% of more in Edison International.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Southern California Edison Company v. *Orange County Transportation Authority* No. 20-cv-2186 (May 16, 2022)

Southern California Gas Company v. *Orange County Transportation Authority* No. 20-cv-2187 (May 16, 2022)

United States Court of Appeals (9th Cir.):

Southern California Edison Company et al. v. *Orange County Transportation Authority* No. 22-55498 (Mar. 13, 2024)

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Southern California Edison Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 96 F.4th 1099. The order of the district court on the parties' cross-motions for summary judgment (App., *infra*, 23a-41a) is available at 2022 WL 1572511.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2024. A petition for rehearing was de-

nied on August 19, 2024 (App., *infra*, 42a-43a). On November 1, 2024, Justice Kagan granted petitioner's application to extend the time to file a petition for a writ of certiorari to and including January 16, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

INTRODUCTION

The Fifth Amendment, as incorporated against the States by the Fourteenth Amendment, constrains the government's taking of private property. The government cannot take property at all unless the taking is for a "public use." U.S. Const. Amend. V. Even then, the government must pay "just compensation" for any property that it takes. *Ibid.* But lower courts have splintered over whether a different, watered-down test applies when the government orders privately owned utilities to relocate their facilities in rights of way.

Below, the Ninth Circuit deepened that split and staked out a position that sets the Takings Clause at war with itself. Respondent (a public transit agency) required petitioner (an investor-owned utility) to relocate its electric conduits, poles, and wires to make way for a public streetcar line. Respondent thus compelled petitioner to surrender property—its franchise right to maintain its facilities in the public streets—to the government. That is a quintessential taking of property that compelled the payment of just compensation for the costs of forced relocation. But the court of appeals

held that the Takings Clause does not require the government to pay for taking such a franchise right as long as it can identify some "public benefit" or assert "any public-facing rationale." App., *infra*, 10a, 18a. That conclusion is impossible to square with the Clause, which makes a "public use" a prerequisite to taking property *with* "just compensation." U.S. Const. Amend. V. Excusing uncompensated expropriation whenever the government claims its action produces a public benefit would negate the Clause's core constraint.

The court of appeals' decision also contravenes this Court's precedents. The Court squarely addressed the Takings Clause's application to forced relocation of a utility's facilities in *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919). *Los Angeles Gas* held that a government must pay just compensation when it requires a utility to relocate its facilities for typical, "proprietary" public uses in public streets (*e.g.*, electric street lights). *Id.* at 38. The Clause excuses compensation, the Court held, only for a narrow subset of public uses that are "governmental" in nature—*i.e.*, exercises of the "police power" to address a "real 'public necessity' arising from consideration of public health, peace or safety." *Ibid*. That properly cabined rule preserves the sovereign prerogative to safeguard health and safety while ensuring that property rights generally retain their constitutional protections.

Despite the Takings Clause's text and this Court's controlling precedent, an entrenched three-way conflict exists concerning the Clause's application to state-mandated relocation of utility facilities to clear space for a transit project. Courts from three States have taken *Los Angeles Gas* at face value in requiring the government to pay for what it takes when it requires

a utility to relocate to make way for a transit project. But courts of three other States have dispensed with this Court's governmental-proprietary distinction, supplanting it with a test that turns on a project's statutory authority. And courts from two more States have split the difference, respecting *Los Angeles Gas* in name but diminishing it into evanescence with arbitrary and invented distinctions.

The Ninth Circuit here joined the lip-service camp. Its decision here sought to distinguish *Los Angeles Gas* out of existence. And it diminished the demanding governmental-proprietary rule this Court recognized—which excuses just compensation only for exercises of sovereign police power to abate threats to public health and safety—into an empty, box-checking test that requires only a "public-facing rationale" to absolve the government from paying. App., *infra*, 18a.

Review of the decision below is warranted. Only this Court can clear up the longstanding three-way conflict about the continuing vitality and correct interpretation of its own precedents. The uncommonly unabashed willingness of multiple lower courts to rewrite *Los Angeles Gas*—or even to discard it to the dustbin of desuetude—calls for intervention by this Court itself. Given that steady, disconcerting drift away from binding precedent, this Court should ensure that constitutional guardrails against uncompensated takings in the important and recurring context of utility relocations remain enduring. Those guardrails are not absolute because the Constitution balances liberty and safety in excusing the government from its obligation to pay for what it takes in limited circumstances when public health and safety are endangered. But outside those contexts, faithfully

enforcing the Takings Clause is "necessary to preserve freedom" and to "empowe[r] persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr* v. *Wisconsin*, 582 U.S. 383, 394 (2017).

Respecting constitutional rights can be inconvenient for the government. But whether to revise the Bill of Rights, as construed by this Court, to strike a different balance between private property rights and public convenience is a question for the people—not county transit agencies or federal courts. Because just compensation is a small price to pay for respecting the constitutional limits on public appropriation of private property, this Court should grant the petition.

STATEMENT

1. Petitioner Southern California Edison Company is an investor-owned utility that supplies electricity in Southern California. App., *infra*, 4a-5a.

In 1938, petitioner signed a franchise agreement with the City of Santa Ana that supplemented its franchise under the California Constitution to install and maintain facilities in the city streets for streetlighting with the right to use electric facilities for other uses, such as heating, in exchange for a percentage of annual receipts. App., *infra*, 5a, 25a. Petitioner acquired the right "'to construct and use in [city] streets, all poles, wires, conduits and appurtenances necessary or proper for'" distributing electricity and broadly "defined 'construct and use' as 'to lay, construct, erect, install, operate, maintain, use, repair or replace.'" *Id.* at 25a (citation omitted). For the next eight decades, petitioner invested in installing and maintaining facilities to meet Santa Ana residents' vital energy needs. *Id.* at 26a.

In 2016, respondent Orange County Transportation Authority announced the route of a new 4.15-mile streetcar line connecting downtown Santa Ana to a transportation center in Garden Grove. App., *infra*, 4a-5a; see Cal. Pub. Util. Code §§ 130200-130203 (establishing respondent as a county transportation commission to plan, build, and operate transit projects). Respondent, like petitioner, had to procure permission from the City of Santa Ana to use its streets. C.A. E.R. 167. Once armed with that permission, respondent sought to clear space for the streetcar's route by displacing petitioner's existing facilities from places it had lawfully occupied for decades under its franchise agreement. App., *infra*, 5a.

Respondent did not, however, want to bear the significant costs of the "substantial construction work" of relocating petitioner's "existing infrastructure and facilities" that respondent's transit project would require petitioner to undertake. App., *infra*, 26a; see C.A. E.R. 155-156 (relocations of 54 underground electricity facilities across 1.3 miles of street and 12 electric poles). Petitioner estimated that its costs of relocation would be nearly $9 million. App., *infra*, 5a. To avoid delaying construction, respondent agreed to advance those costs but reserved the right to demand that petitioner should bear the relocation costs occasioned by the transit project. *Id.* at 5a, 26a.

2. Petitioner brought this action under 42 U.S.C. § 1983, seeking a declaration that the Takings Clause guaranteed its right to just compensation for the forced relocation. App., *infra*, 27a. Another utility forced by respondent to relocate its facilities, Southern California Gas Company, filed a separate complaint against respondent seeking compensation for

relocation costs; the district court consolidated the two suits. C.A. E.R. 384. The parties jointly stipulated to the relevant facts and cross-moved for summary judgment. App., *infra*, 27a.

Invoking *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919), petitioner argued that the Takings Clause required respondent to pay just compensation for the relocation costs because the construction of a streetcar is a "proprietary"—as opposed to "governmental"—use of the streets. App., *infra*, 31a-32a. For its part, respondent urged the district court to rely on the California Legislature's generalized findings that the construction of mass transit "increas[es] mobility," provides "adequate public transportation to all citizens," and mitigates "climate change." *Id.* at 34a-35a (citing Cal. Pub. Util. Code § 130001(a), (b), (e)).

The district court granted summary judgment to respondent, holding that the Takings Clause does not prevent a public entity from shifting to utilities the costs of relocation to accommodate a streetcar project. App., *infra*, 23a-41a. In concluding that the project qualified as "governmental" under *Los Angeles Gas*, the court "defer[red] to and agree[d] with the Legislature's finding that increasing [public] transit improves public safety by increasing mobility and improves public health by decreasing pollution." *Id.* at 35a.

3. The Ninth Circuit affirmed the district court's grant of summary judgment to respondent. App., *infra*, 1a-22a.

The court of appeals acknowledged that respondent's mandated relocation of petitioner's facilities would

"[o]rdinarily" constitute "government action that 'physically appropriates' property"—"'a *per se* taking' requiring just compensation." App., *infra*, 8a (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149 (2021)). The court also accepted that respondent could avoid that obligation to pay only if it could establish that an "'independent source'" of property law authorized respondent's physical appropriation, judged against the baseline of "'existing rules or understandings'" when petitioner acquired its franchise rights. *Ibid.* (quoting *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998)); see *id.* at 12a (citing *Stop the Beach Renourishment, Inc.* v. *Florida Department of Environmental Protection*, 560 U.S. 702, 733 (2010) (plurality opinion)). The court further observed that those independent sources of law include "state law," "'traditional property law principles, plus historical practice,'" and this "'Court's precedents.'" *Id.* at 8a-9a (quoting *Tyler* v. *Hennepin County*, 598 U.S. 631, 638 (2023)). And the court acknowledged that *Los Angeles Gas* could set forth "a federal-law basis for [petitioner's] asserted property interest." *Id.* at 16a.

The court of appeals framed the key question as whether the state-law property rights that petitioner acquired under its 1938 franchise agreement were subject to a background exception for utilities to relocate at their expense for a public transit project. App., *infra*, 9a-18a. In the court's view, California law did not entitle petitioner to just compensation because respondent "invoke[d] the public right for the public benefit" when requiring petitioner to relocate. *Id.* at 10a (citation omitted). The court also pointed to what it described as a traditional requirement for utilities "to bear the entire cost of relocating from a public

right-of-way whenever requested to do so by state or local authorities." *Id.* at 14a-15a (quoting *Norfolk Redevelopment & Housing Authority* v. *Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35 (1983)).

The court of appeals rejected petitioner's argument that this Court in *Los Angeles Gas* had recognized a contrary background rule requiring just compensation for forced relocation of utility facilities unless the public project is a "police measure adopted for the protection of the public." 251 U.S. at 40; see App., *infra*, 16a-18a. Although *Los Angeles Gas* had required the government to show that the project addresses a "real 'public necessity' arising from consideration of public health, peace or safety," 251 U.S. at 38, the court of appeals read that language as authorizing uncompensated relocation whenever the government can articulate "any public-facing rationale" for taking a utility's property rights, App., *infra*, 18a. The court also declined to "make [its] own assessment" of the purposes served by the streetcar line because the California Legislature had authorized respondent to build the line and had generally identified "valuable public purposes" for mass transit. *Id*. at 17a (citing Cal. Pub. Util. Code § 130001).

In short, the court of appeals held that petitioner must "foot the bill" for its mandated relocation because respondent had "state-delegated authority" to build a transit line and had stated a "public-facing rationale" for its streetcar. App., *infra*, 10a, 18a.

4. The Ninth Circuit denied rehearing en banc. App., *infra*, 42a-43a.

REASONS FOR GRANTING THE PETITION

The Court's intervention is warranted to resolve a deeply entrenched split among courts about the proper application of the Takings Clause and the continuing vitality of *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919). There, the Court reaffirmed the traditional common-law distinction between typical public projects, for which the State must pay just compensation, and public uses that are actually "exertion[s] of the police power" to address a "real 'public necessity' arising from consideration of public health, peace or safety." 251 U.S. at 38-39. The Court held that utilities are entitled to just compensation for relocating their facilities unless a public use fits in the latter, narrow category.

Courts of three States have adhered to *Los Angeles Gas* by requiring compensation when a public entity forces a utility to relocate for a mass-transit project. In contrast, courts of three other States have swept away *Los Angeles Gas*, replacing its governmental-proprietary distinction with other tests that invite uncompensated takings in nearly all cases when the government displaces a utility's facilities for a public project. And still other courts have paid *Los Angeles Gas* only lip service by accepting it as precedent in name but narrowing it into nonexistence in substance—yielding the same basic result as courts that openly treat it as overtaken by intervening developments. The decision below further entrenched that conflict by likewise adopting contrived distinctions to distinguish *Los Angeles Gas* into oblivion.

This Court's intervention is also warranted to reaffirm a fundamental principle of vertical *stare decisis*.

It is an undisputed, oft-repeated axiom that lower courts cannot overrule decisions of this Court, "regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998); see, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). Yet multiple lower courts have expressly purported to dispense with the governmental-proprietary distinction that this Court applied in *Los Angeles Gas* between public projects, for which the Takings Clause requires just compensation for utility-relocation costs, and those limited exertions of the police power that do not trigger just-compensation obligations. Even if reconsideration of that sound, long-settled distinction were warranted, that is exclusively the province of this Court.

Moreover, the decision below is deeply wrong as an original matter. Respondent is a later user of the streets, not a sovereign regulator. Yet the court of appeals invited public officials to shield physical appropriations of property behind *post hoc* "public-facing rationale[s]" and thereby escape their obligation to compensate altogether. App., *infra*, 18a. That rule cannot be reconciled with the Takings Clause's requirement of just compensation when the government takes property *for* a "public use." U.S. Const. Amend. V. And the court's willingness to treat the legislature's findings as dispositive of such a public purpose cannot be reconciled with this Court's recent rejection of "special deference for legislative takings." *Sheetz* v. *County of El Dorado*, 601 U.S. 267, 277 (2024).

The Court should grant review to resolve this important and commonly recurring question concerning the Takings Clause's protection against the uncompensated public appropriation of franchise rights.

I. THE DECISION BELOW DEEPENS A CONFLICT AS TO WHEN THE TAKINGS CLAUSE REQUIRES JUST COMPENSATION FOR UTILITY RELOCATION

The Ninth Circuit cemented an entrenched conflict among state and federal courts concerning how the Takings Clause applies to forced utility relocations. This Court directly addressed the question in *Los Angeles Gas*, instructing courts to apply the traditional common-law governmental-proprietary distinction when public projects displace private franchise holders in city streets. But in the years between that decision and the Ninth Circuit's ruling below, many lower courts openly departed or drifted away from this Court's precedent to the point of abandoning it, even while others held firm. The decision below deepens the conflict: Like several other courts, the Ninth Circuit purported to follow *Los Angeles Gas* while distorting the decision beyond recognition and rendering it a dead letter.

A. The Fifth Amendment provides that private property shall not be "taken for public use, without just compensation." U.S. Const. Amend. V; see *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U.S. 226, 239 (1897) (holding that the Fourteenth Amendment incorporates the Takings Clause against the States). This Court settled long ago that the government must pay just compensation when it forces a utility to relocate facilities or equipment laid along public streets pursuant to a franchise right unless the government's use of the street is "governmental" as opposed to "'proprietary.'" *Los Angeles Gas*, 251 U.S. at 38-39. As the Court explained, "governmental" means an action that is an "exertion of the police power"—a special sovereign responsibility to address

a "real 'public necessity' arising from consideration of public health, peace or safety." *Id*. at 38. General public convenience does not suffice, because when the government instead acts in a "'proprietary or quasi-private capacity,'" it is "subordinate in right" to a utility that is "an earlier and lawful occupant of the field," and the government therefore must pay for what it takes. *Id*. at 38-39.

Los Angeles Gas involved an ordinance establishing a municipal streetlight system and permitting the removal and relocation of "poles and other property in the public streets" to clear room for the new system. 251 U.S. at 34. Invoking that provision, Los Angeles ordered a private utility operating under a franchise to relocate its wires and facilities from the public streets at its own expense. *Id*. at 36-37. The utility sought an injunction to prevent the relocations absent the payment of just compensation. *Id.* at 33-34.

This Court held that the "proposed uncompensated taking" violated the Takings Clause. *Los Angeles Gas*, 251 U.S. at 40. An earlier decision established that a utility's "'privilege, franchise, or easement to place in the public streets of a city the conduits necessary or convenient for the business of supplying light or power'" is "a property right, protected by the Federal Constitution." *Russell* v. *Sebastian*, 233 U.S. 195, 204 (1914) (citation omitted). Citing *Russell*, the Court reasoned that the utility's franchise rights gave it a property interest protected "against being taken without the proper process of law—the payment of compensation." *Los Angeles Gas*, 251 U.S. at 39. The Court held that, because the utility was the "earlier and lawful occupant of the field" under its franchise agreement, the utility was not "subject to be displaced by some

other system, even that of the city, without compensation to the corporation for the rights appropriated." *Id.* at 39-40. Any other rule would improperly render franchise rights "infirm indeed in tenure and substance," despite the need to encourage utilities to "inves[t]" in reliance on their property rights. *Id.* at 39.

Los Angeles Gas did not write on a blank slate but applied a longstanding common-law test that governed when property rights had to yield to public health and safety imperatives. See 251 U.S. at 39. The Court cited as a counterpoint its earlier decision in *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905), that a privately owned utility had no right to compensation when forced to relocate its "pipes in the streets" to make way for a public drainage project. *Id.* at 462. Public drainage was so "highly necessary in the promotion of the public health" that the Court described the project as "one of the most important purposes for which the police power can be exercised." *Id.* at 460, 462. For a function so "essential to the health of the community," the city could order the relocation of utilities without compensation to advance a "public health" concern of "the highest importance." *Id.* at 460-461. *Los Angeles Gas* shows that, absent such a showing, the Takings Clause requires just compensation. 251 U.S. at 38-40.

B. Despite *Los Angeles Gas*'s clear teaching, lower courts have fractured into three distinct camps. Some courts faithfully adhere to *Los Angeles Gas*. Others have dispensed with the governmental-proprietary distinction altogether. And still others, including the Ninth Circuit here, have purported to follow *Los Angeles Gas* while in reality interring its reasoning and enervating its precedential force into oblivion.

1. Three state courts have followed this Court's instructions to follow the governmental-proprietary distinction in utility-relocation cases and have applied that test to require compensation when a utility is forced to relocate its facilities for a transit project.

New York's highest court has applied *Los Angeles Gas* to require compensation under circumstances similar to those presented here. In *New York* v. *New York Telephone Co.*, 14 N.E.2d 831 (N.Y. 1938), New York City sought to force a utility to relocate its "wire, conduits, and other structures" to make way for the City's subway. *Id.* at 831. The New York Court of Appeals held that the subway construction "was a proprietary activity of the city," which "must bear the cost" of the utility's relocations. *Id*. at 832-833 (citing *Los Angeles Gas*, 251 U.S. 32). Applying this "rule of the common law," the court contrasted the construction of transit with other projects that would not lead to compensation because they are "governmental" in nature. *Id*. at 832. Those cases, the court reasoned, belonged to a narrow class of projects that had to be undertaken to address an "element of danger" to the public. *Ibid*.

Ohio and Maryland courts likewise have interpreted *Los Angeles Gas* to require compensation when a utility is ordered to make way for a transit project. The Ohio Supreme Court has reasoned that "[a] governmental subdivision in the exercise of its proprietary functions is in the same position as a private utility attempting to force such relocation." *State ex rel. Speeth* v. *Carney*, 126 N.E.2d 449, 460 (Ohio 1955). Because "operation of a governmentally owned transit system is a proprietary and not a governmental function," the government had to pay the utility's reloca-

tion costs. *Ibid*. Maryland's highest court agreed with *Speeth* that a "utility's costs" resulting from the "closing of the streets" for a public project must be compensated because that "proprietary exercise of power * * * puts the sovereign * * * on an equal basis with" the utility. *Baltimore* v. *Baltimore Gas & Electric Co.*, 192 A.2d 87, 88, 94-95 (Md. 1963) (citing *Los Angeles Gas*, 251 U.S. 32); see also *Milwaukee Electric Railway & Light Co.* v. *Milwaukee*, 245 N.W. 856, 858 (Wis. 1932) (describing requirement of just compensation as settled for transit projects).

2. Although *Los Angeles Gas* remains on the books, a series of lower courts have abandoned the governmental-proprietary distinction on the view that the traditional common-law test it applied is now outmoded.

The Oregon Supreme Court has abandoned *Los Angeles Gas*, calling the governmental-proprietary distinction "unworkable, untenable and unhelpful in deciding mass transit/utility relocation cases." *Northwest Natural Gas Co.* v. *Portland*, 711 P.2d 119, 126 (Or. 1985). According to that court, cases that (like *Los Angeles Gas*) applied the governmental-proprietary distinction had done so "without helpful analysis." *Id.* at 124-125. The court also pointed to this Court's later abandonment of the governmental-proprietary distinction in a different context: the Tenth Amendment doctrine of reserved state powers. See *id.* at 126 (citing *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)). Although the Oregon Supreme Court did not suggest that this Court had ever revisited *Los Angeles Gas*, it denounced the "general rules of the common law" undergirding this Court's decision; in their place, *Northwest Natural Gas* ap-

plied a rule that the government can require a utility to move at its own expense whenever the government has state-law authority for the project. *Ibid.*; see *id.* at 127.

Vermont and Colorado courts have followed the Oregon Supreme Court in rejecting the governmental-proprietary distinction in this context, but without even acknowledging its adoption by this Court. The Vermont Supreme Court cast that rule aside as based on "outmoded ideas" and plagued with "difficulty." *Vermont Gas Systems, Inc.* v. *Burlington*, 571 A.2d 45, 47 (Vt. 1989). Rather than attempt to apply the purportedly "unnecessary and unworkable distinction," the court held that, when "'state statutes, applicable municipal charters and ordinances'" authorize the relocation, the utility has no right to just compensation for its relocation costs. *Id.* at 48 (quoting *Northwest Natural Gas*, 711 P.2d at 126). The Colorado Supreme Court similarly disparaged the distinction as "unhelpful, inherently unsound," and "unsatisfactory." *City & County of Denver* v. *Mountain States Telephone & Telegraph Co.*, 754 P.2d 1172, 1173-1174 (Colo. 1988) (citation omitted); see *id.* at 1175 (citing *Northwest Natural Gas*, 711 P.2d at 124). Instead of following the governmental-proprietary distinction, Colorado courts require "a utility to pay the cost of relocating its facilities from a public street whenever the municipality requires it in the exercise of its police power to protect the public health, safety, *or convenience*." *Id.* at 1176 (emphasis added).

3. A third set of decisions takes a hybrid approach that honors the governmental-proprietary distinction in name only but in substance renders *Los Angeles Gas* a dead letter. These courts shrink the "proprietary"

category to an implausibly narrow subset of public projects on grounds disconnected from the Takings Clause and this Court's reasoning. In doing so, they have drastically limited when the Clause guarantees just compensation for forced utility relocation.

The Pennsylvania Supreme Court has interpreted *Los Angeles Gas* to allow the government to evade its obligations under the Takings Clause. The court has superficially applied the governmental-proprietary distinction, accurately describing a "government[al]" action as one that is needed to protect the "safety of the lives and the property of the citizens." *Philadelphia Electric Co.* v. *Philadelphia*, 152 A. 23, 26, 28 (Pa. 1930). The court nevertheless held that Philadelphia did not need to compensate a utility forced to relocate to make way for a subway system, reasoning that the city's chosen subway line would run through the preexisting electric facilities and thereby cause a safety hazard that falls within the city's "government[al]" powers. *Id.* at 26. In other words, the government can *create* a safety hazard—by electing to construct a transit line through existing power lines—and bootstrap a proprietary project into the governmental category.

By contrast, the California Court of Appeal started off on the right foot in *Postal Telegraph-Cable Co.* v. *City & County of San Francisco*, 199 P. 1108 (Cal. Ct. App. 1921), which held that the Takings Clause required San Francisco to pay a utility that was forced to relocate telegraph conduits to make way for a municipal street railway system. *Id.* at 1109. The court treated *Los Angeles Gas* as dispositive, holding that in operating a mass transit project the government acts in a "proprietary and not in a governmental capacity." *Ibid.* The court also refused to limit *Los Angeles Gas*

to cases in which the city forces the relocation "of its competitors." *Id*. at 1110. Because constructing a streetcar did not implicate the city's "police or governmental powers," San Francisco could not "compel the removal or destruction of the plaintiff's property" "without compensation." *Id*. at 1109-1110. The California Supreme Court and this Court denied San Francisco's requests for further review. *Id.* at 1108; *City & County of San Francisco* v. *Postal Telegraph Cable Co.*, 257 U.S. 648 (1921).

In recent years, however, the California Court of Appeal has drifted away from *Los Angeles Gas*. The court, now as then, recognizes that the governmental-proprietary distinction comes from "a holding by the United States Supreme Court, based on the federal constitution." *Riverside County Transportation Commission* v. *Southern California Gas Co.*, 54 Cal. App. 5th 823, 868 (2020). Unlike those state courts that have simply "jettison[ed]" the "distinction," the court did not "feel free" to abandon *Los Angeles Gas* outright. *Ibid.* But *Riverside* nonetheless adopted a novel reading of the case, holding that *Los Angeles Gas* requires compensation only if the government forces relocation of "*all*" of the franchise's equipment *and* acts in a proprietary capacity. *Ibid*. By contrast, if the government takes only "*some*" of the franchise rights, it need not pay—even if the reason for the taking is an entirely proprietary project. *Ibid*. The court also suggested that *Los Angeles Gas* has been "undercut" by subsequent precedent, such that "the reasons underlying the governmental-proprietary distinction * * * are no longer valid." *Id*. at 869. The court did not purport to identify any decision of this Court overruling *Los Angeles Gas*'s holding that the governmental-

proprietary distinction governs under the Takings Clause.

C. The Ninth Circuit followed the third path here, purporting to follow *Los Angeles Gas* but distorting its rule and reasoning beyond recognition.

To start, the court of appeals broke with the courts that hold that the Takings Clause requires the payment of just compensation when the government requires a utility to relocate a public transit project. App., *infra*, 9a-18a. The court held that the streetcar line was "governmental" simply because respondent had "invoked the public right to use the streets for the public benefit." *Id.* at 10a. If petitioner had filed this action in the courts of, say, Ohio or New York, it would have prevailed under precedent establishing that transit projects are proprietary under *Los Angeles Gas*. *Speeth*, 126 N.E.2d at 460; *New York Telephone*, 14 N.E.2d at 831-833. But utilities in the Ninth Circuit will likely hit a dead end in their pursuit of just compensation for forced relocation.

The court of appeals stopped short of openly abandoning *Los Angeles Gas*'s governmental-proprietary distinction altogether. App., *infra*, 10a-14a. The court accepted that *Los Angeles Gas* was binding precedent that this Court has never overruled. *Id.* at 16a-18a. And it gestured at a proper exercise of the police power as a requirement for the governmental category of public projects. *Id.* at 13a, 16a. The court thus diverged from courts that have expressly rejected the common-law rule that this Court in *Los Angeles Gas* held controlling in this context. See pp. 16-17, *supra*.

The Ninth Circuit thus joined those courts that purport to accept *Los Angeles Gas*, but reduce it to an

empty husk. Like the Pennsylvania Supreme Court and the California Court of Appeal in its latest decision, the Ninth Circuit expanded the concept of police power to encompass any public benefit and correspondingly cabined *Los Angeles Gas* to highly unusual circumstances when the government cannot articulate "any public-facing rationale" for its project. App., *infra*, 18a.

As a result, the Takings Clause's application depends on where a utility files suit. And the meaning and precedential force of *Los Angeles Gas* have shrunk in many jurisdictions, including the Nation's most populous circuit. That conflict over the continued vitality of one of this Court's precedents can be resolved in only one place: the same Court that handed down *Los Angeles Gas* to begin with. This Court should grant review.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS INTERPRETING THE TAKINGS CLAUSE

The Takings Clause certainly has something to say about the government's ability to clear property out of the way for a public project and then to offload the costs on the dislodged party. Physical appropriation of petitioner's right to maintain its facilities in city streets is a per se taking requiring just compensation unless that uncompensated displacement is "consistent with longstanding background restrictions on property rights," not just with state law. *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 160 (2021). As this Court made clear in *Los Angeles Gas*, the background rule relevant here is starkly *inconsistent* with respondent's expropriation: Utilities must move at their own expense only for "governmental" projects—

meaning exercises of the "police power" to abate risks to public health and safety—but not for more typical, "proprietary" public projects. 251 U.S. at 38-39. Yet the Ninth Circuit negated that background rule by authorizing any state appropriation of utility rights that yields any "public benefit" or can be said (even post hoc) to serve "any public-facing rationale." App., *infra*, 10a, 18a. That approach uproots this Court's Takings Clause jurisprudence and turns the Clause upside-down.

A. *Cedar Point* supplies the controlling analytical framework: When the government physically appropriates a property right, the government must pay just compensation for what it takes unless it can establish that "longstanding background restrictions on property rights" authorized its action. 594 U.S. at 160. Such a background restriction would show that the government, rather than taking property, has merely asserted "a 'pre-existing limitation upon'" the property interest. *Ibid.* (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992)). But unless such an exception applies, the government must comply with its "clear and categorical obligation" to pay just compensation for any physical appropriation of property. *Id.* at 147.

1. "Because the Constitution protects rather than creates property interests," the first question is whether petitioner possessed a property interest in maintaining its facilities in the city streets. *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998). Its franchise agreements granted it such a right. See p. 5, *supra*. And this Court has recognized the state-law right to install and maintain facilities as a form of property. *Los Angeles Gas*, 251 U.S. at 39;

see, *e.g.*, *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 661 (1912); see also *Tulare County* v. *City of Dinuba*, 206 P. 983, 986 (Cal. 1922) (calling a franchise a type of "easement").

Petitioner also established a physical appropriation, as the court of appeals acknowledged. App., *infra*, 8a. Petitioner's facilities lawfully occupied their locations in the street for decades, yet respondent asserted authority to displace those facilities to clear space for its transit line. See p. 6, *supra*. That petitioner was displaced at "specific locations" and could later reinstall facilities elsewhere, App., *infra*, 9a, has no bearing on whether a physical appropriation occurred. As *Cedar Point* made clear, the "duration" and "size" of an appropriation "bears only on the amount of compensation," not on the existence of a taking. 594 U.S. at 153. Here, the duration and size of that appropriation led to nearly $9 million in relocation costs for petitioner. App., *infra*, 5a; see C.A. E.R. 169.

2. Because respondent physically appropriated petitioner's property interests, it could avoid the Constitution's just-compensation mandate only if it established that its actions complied with a "traditional background principle of property law." *Cedar Point*, 594 U.S. at 162. *Los Angeles Gas* identified the pertinent longstanding background rule for utility relocation: The government retains the power to compel utilities operating under a franchise to relocate only for a "governmental" use of the streets—a term synonymous with an "exertion of the police power" to address a "real 'public necessity' arising from consideration of public health, peace or safety." 251 U.S. at 38. Respondent's action does not fit that bill.

The "governmental" exception is limited to public projects that represent an exercise of sovereign authority to abate threats to public health and safety. As the Court has long held, "the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place." *Cedar Point*, 594 U.S. at 160; see *Lucas*, 505 U.S. at 1029-1030; *Mugler* v. *Kansas*, 123 U.S. 623, 664 (1887) (observing that a grant of property rights cannot "bargain away the public health or the public morals" (citation omitted)). Franchise rights are equally subject to the traditional common-law background rule that the government can abate conditions that are "in the nature of nuisances." *New York & New England Railroad Co.* v. *Bristol*, 151 U.S. 556, 567 (1894). And in exchange for using city streets, utilities have long accepted the obligation to relocate for a "real 'public necessity' arising from consideration of public health, peace or safety." *Los Angeles Gas*, 251 U.S. at 38; see, *e.g.*, *New Orleans Gas*, 197 U.S. at 460. The background rule thus reconciles the sovereign prerogative to protect health and safety with federal protection of property rights.

Respondent could not establish any such real public necessity to justify exempting its project from the constitutional guarantee of just compensation for forced relocation. Constructing public works for the public benefit is not enough for this narrow exception to the Takings Clause to apply, as *Los Angeles Gas* shows. 251 U.S. at 40. Respondent did not point to any "peril" or "defect" in the manner that petitioner maintained its facilities that would allow for uncompensated measures to abate threats to public health and safety.

Id. at 38. Nor did respondent ever explain how constructing a 4.15-mile streetcar line could be "a police measure adopted for the protection of the public." *Id.* at 40. This Court's decisions establish that transit projects—unlike public-health infrastructure (*e.g.*, sewers) or legal limitations that abate a nuisance (*e.g.*, unsafe crossings)—have always been proprietary rather than governmental under the traditional test. Even a "street railway," administered "for what the State conceives to be [a] public benefit," "is still a particular business enterprise" in which the government acts as a marketplace participant. *Helvering* v. *Powers*, 293 U.S. 214, 223-225 (1934); accord *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. 678, 686 (1982).

In short, respondent was "subordinate in right" to petitioner, the "earlier and lawful occupant of the field," and has not demonstrated a "real 'public necessity' arising from consideration of public health, peace or safety" establishing a governmental character for its streetcar line. *Los Angeles Gas*, 251 U.S. at 38-39.

B. The Ninth Circuit's contrary application of *Los Angeles Gas* cannot be reconciled with that decision itself, the Takings Clause's plain language, or the century's worth of this Court's takings jurisprudence that has followed *Los Angeles Gas*.

1. The court of appeals insisted that "*any* public-facing rationale" the government can come up with (even after the fact) allows for the uncompensated relocation of utility facilities, describing *Los Angeles Gas* as a case in which the government had a "self-serving motive" to take the utility's property. App., *infra*, 17a-18a (emphasis added). The court thus drastically widened the narrow "governmental" exception

Los Angeles Gas articulated—limited to exertions of police power needed "for the protection of the public" health or safety, 251 U.S. at 40—into a sweeping, easily satisfied general rule.

The court of appeals tacitly sought to square its ruling with *Los Angeles Gas* by reading that decision to allow the government to force uncompensated relocation through "*any* proper exercise of the police power" in a nebulous, expansive sense. App., *infra*, 16a (citation omitted). But that is not how *Los Angeles Gas* used the term. Shortly before that decision, this Court explained that the "police power" can refer to either "the whole field of state authority" or "only state power to deal with the health, safety and morals of the people." *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163, 185-186 (1919). *Los Angeles Gas* referred to police power in the narrower (latter) sense of measures needed to protect "public health, peace or safety." 251 U.S. at 38. The Court later reiterated that, because assertions of the "police power" in the broad (former) sense do not "justify disregard of constitutional inhibitions" absent a "serious danger to the public," facilities that "presen[t] obstacles to construction" of proposed public works must be "overcome by condemnation proceedings"—with the corresponding payment of just compensation. *Panhandle Eastern Pipe Line Co*. v. *State Highway Commission of Kansas*, 294 U.S. 613, 619 (1935); cf. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240 (1984) (police power can satisfy "[t]he 'public use' requirement" for a *compensated* taking).

The court of appeals also placed heavy reliance on this Court's abbreviated dictum decades later that "'the traditional common law rule' is that utilities are

'required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.'" App., *infra*, 4a (quoting *Norfolk Redevelopment & Housing Authority* v. *Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35 (1983)); see *id.* at 6a, 15a. Opinions passing on issues "*sub silentio*" do not "overrul[e] an opinion addressing the issue directly." *Hohn*, 524 U.S. at 252. Moreover, the very first source *Norfolk* itself cited for that dictum, 464 U.S. at 35, reiterates *Los Angeles Gas*'s rule that the traditional common-law rule required public entities to pay a utility's costs when "the relocation of its facilities has been necessitated by the [entity's] exercise of a *proprietary* rather than a governmental function or purpose," 12 E. McQuillin, *Law of Municipal Corporations* § 34.74a (3d ed. 1970) (emphasis added).

Ultimately, the court of appeals appeared to share some other courts' view that *Los Angeles Gas* has become outmoded in a modern world where the government has entered formerly private marketplaces at an ever-increasing rate. App., *infra*, 17a; see pp. 16-17, *supra*. But an inferior court's view that this Court's decision is "moth-eaten" is never justification to disregard or narrow binding precedent. *State Oil*, 522 U.S. at 20 (citation omitted). The Court is fully equipped to assess the continued vitality of its own precedents. The Court has never overruled its holding in *Los Angeles Gas* that the governmental-proprietary distinction governs utility relocation under the Takings Clause or its holding that transit projects are proprietary under the traditional test. Quite the opposite: The *Cedar Point* framework has only strengthened the doctrinal underpinnings of *Los Angeles Gas*. See pp. 22-25, *supra*. Review is necessary to uphold the

principle that this Court has the "prerogative alone to overrule one of its precedents." *State Oil*, 522 U.S. at 20.

2. The court of appeals' decision to equate the governmental capacity with "public purposes," App., *infra*, 17a, or "public benefit[s]," *id.* at 14a, also sets the Takings Clause at war with itself. The Clause prohibits the taking of public property "for public use, without just compensation." U.S. Const. Amend. V. But although the government must prove a public use for a compensated taking, the court of appeals' decision perversely turns that same public use into a basis for *denying* just compensation.

This case illustrates the mismatch between the Takings Clause and the court of appeals' reimagining of *Los Angeles Gas*. Respondent's effort "to use the streets of Santa Ana for the public benefit," App., *infra*, is the kind of "public purpose" that allows the government to take property *with* just compensation, *Kelo* v. *New London*, 545 U.S. 469, 480 (2005). Yet the Ninth Circuit took the same "public purpos[e]" that permits a compensated taking as a license for respondent to take property *without* compensation. App., *infra*, 17a. In other words, the court adopted the circular view that respondent's public use was both the ticket into the Takings Clause and the ticket out of paying just compensation.

After ratcheting down the standard in *Los Angeles Gas* from police measures needed to abate threats to public health and safety to any conceivable public benefit, the court of appeals then held that the government can clear that low bar merely by articulating "any public-facing rationale." App., *infra*, 18a.

That test verges on rational-basis review of the just-compensation mandate. But this Court in *Lucas* rejected as too permissive an even more stringent version of the Ninth Circuit's test that would have withheld compensation when "the legislature has recited a harm-preventing justification for its action." 505 U.S. at 1025 n.12. Because "such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff." *Ibid.* The Takings Clause should not reserve compensation for the rare circumstance in which a bureaucrat is too tongue-tied—or too honest—to offer a "public-facing rationale" for appropriating private property. App., *infra*, 18a. And the Ninth Circuit's refusal to make its "own assessment of whether a streetcar line is or is not necessary" to address any public health or safety risk, *id.* at 17a, would "relegat[e] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights," *Knick* v. *Township of Scott*, 588 U.S. 180, 189 (2019) (citation omitted).

The court of appeals not only held that a public purpose can justify an uncompensated taking, but it also equated a public purpose with anything the legislature deems worthy of authorizing, or that a bureaucrat can fit after the fact within some broad statutory authorization. The court found that such a rationale existed because the California Legislature had authorized respondent to construct transit projects and had made generalized findings that new projects could meet "demand for an efficient public transportation system in the southern California region," reduce "automobile-related air pollution," and "offer adequate public transportation to all citizens, including those immobilized by poverty, age, physical handicaps, or

other reasons." App., *infra*, 10a (quoting Cal. Pub. Util. Code § 130001(a), (b), (e)). Similarly, the district court "defer[red] to" the Legislature's desire to mitigate "climate change" and to expand the availability of public transit as justifications for this 4.15-mile streetcar project. *Id.* at 34a-35a (citation omitted).

Both courts below erred in allowing deference to statutory authority and legislative findings to substitute for rigorous constitutional analysis of the governmental-proprietary distinction under *Los Angeles Gas*. This Court reiterated just last Term that there is no "special deference for legislative takings." *Sheetz*, 601 U.S. at 277. In *Cedar Point*, for example, the California Legislature had found that allowing union organizers to access farms had "benefit[s]," including "labor peace." 594 U.S. at 178 (Breyer, J., dissenting). Those benefits, although perhaps a public use justifying a compensated taking, could not "balanc[e] away" the farmers' right to just compensation. *Id.* at 158 (majority opinion). A contrary rule would allow States to eviscerate the Constitution's just-compensation mandate by simply passing a statute—an outcome that defies the Takings Clause's text, history, and jurisprudence. *Sheetz*, 601 U.S. at 276-278.

3. The court of appeals also pointed to a 1937 California statute that it read to require utilities sometimes to relocate at their own expense for transit projects. App., *infra*, 11a. The court acknowledged that the statute does not apply here because it addresses only requests by municipalities, not regional entities like respondent. See *ibid.* And in any event, "traditional property law principles" and "this Court's precedents" set a baseline under the Takings Clause. *Tyler*, 598 U.S. at 638 (citation omitted). In *Tyler*, for

example, the Court applied that principle to disregard a 1935 Minnesota statute that purported to reallocate to the government the surplus from a forced sale of a house to recover unpaid property taxes. *Id.* at 639. The court of appeals thus agreed that California could not "'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." App., *infra*, 8a (quoting *Tyler*, 598 U.S. at 638). A statute that aims to supplant *Los Angeles Gas* would be no more effective than a statute generally providing that the government can take property without just compensation.

At any rate, the court of appeals badly misread the statute. California law requires utilities to "relocate without expense to the municipality * * * if and when made necessary by any lawful change of grade, alignment, or width of any public street * * * including the construction of any subway or viaduct, by the municipality." Cal. Pub. Util. Code § 6297; see Franchise Act of 1937, ch. 650, § 10, 1937 Cal. Stat. 1785. The court reasoned that, if utilities have to move for subways, then there is no "reason why above-ground rail lines should be treated differently." App., *infra*, 11a. But as California courts have explained, the 1930s-era statute "uses 'subway' in the sense of an undercarry" that changes the "grade, alignment, or width of a public street"—"not in the sense of an underground railway." *Riverside*, 54 Cal. App. 5th at 859 n.19; see Subway, *Webster's New International Dictionary* (2d ed. 1936) ("[A] passage under a street, in which water mains, gas mains, telegraph wires, etc., are conducted.").

Section 6297 thus tracks this Court's decisions that the Takings Clause does not require just compensation when cities exercise their paramount title in

the streets to change their path, including raising them to a "viaduc[t]" or lowering them to a "subwa[y]." *Sauer* v. *New York*, 206 U.S. 536, 554-555 (1907); see, *e.g.*, *Cincinnati, Indianapolis & Western Railway Co.* v. *Connersville*, 218 U.S. 336, 344 (1910). If utilities had no protection at all from later-coming projects in streets as they currently exist, the California Legislature could have written a much shorter and more broadly worded statute.

* * *

The court of appeals held that respondent's policy goals for building a streetcar line could justify an uncompensated taking. But this Court recently emphasized that, whatever "the complexities of modern society" might be, "they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty." *Cedar Point*, 594 U.S. at 158. The Court should grant review and hold that the Takings Clause does not allow respondent to force petitioner "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (citation omitted).

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

A. The Takings Clause represents one of the most basic protections and bargains enshrined in the Constitution: The government may take private property for public use, but it must pay for what it takes. Holding governments to that bargain is "necessary to preserve freedom" because it "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr*

v. *Wisconsin*, 582 U.S. 383, 394 (2017). Neither this Court nor the Founders were trading in hyperbole when stating that "[p]roperty must be secured, or liberty cannot exist." *Cedar Point*, 594 U.S. at 147 (quoting Discourses on Davila, in 6 *Works of John Adams* 280 (C. Adams ed. 1851)).

The decision below upsets the careful balance that the Takings Clause strikes, tilting the scales decidedly in the government's favor. As it stands now, the rule in the Ninth Circuit (joining a number of States) is that a governmental entity need not pay just compensation for relocations caused by a public project whenever a government official can articulate any "public-facing rationale." App., *infra*, 18a. The Constitution's guarantees of "freedom" against uncompensated government intrusion should not be at the mercy of the officials who themselves benefit from the taking. *Murr*, 582 U.S. at 394.

B. The petition also would afford the Court a clean vehicle to assess the role of the police power under the Takings Clause in a well-developed context. Two members of this Court recently expressed interest in analyzing the interplay between "the Takings Clause" and the "police power." *Baker* v. *City of McKinney*, No. 23-1363 (Nov. 25, 2024), slip op. at 6 (Sotomayor, J., joined by Gorsuch, J., respecting denial of certiorari). Although those Justices viewed the conflict in that context as warranting further percolation, *id.* at 5-6, this case involves a longstanding split over uncompensated utility relocation. The common-law rule recognized in *Los Angeles Gas* thus will offer a more concrete backdrop for assessing the relationship between the police power and the Takings Clause.

The question presented is also recurring. The Nation has nearly 100,000 local governments and state agencies. Federal Reserve Bank of St. Louis, *Local Governments in the U.S.: A Breakdown by Number and Type* (Mar. 14, 2024), tinyurl.com/y2en4b5p (reporting count of 90,837 local governments). People within those jurisdictions also depend on utility facilities—gas, electricity, water, telephone, and so on—that are woven into the infrastructure of streets just about everywhere. So whenever a local government or transit agency wishes to construct or maintain a public transit project, it is highly likely to run into existing utility lines and facilities. See, *e.g.*, *Mergentime Corp.* v. *Washington Metropolitan Area Transportation Authority*, 2006 WL 416177, at *12 (D.D.C. Feb. 22, 2006) (describing need to "relocate major utilities" when boring subway tunnels for the D.C. metro).

This petition thus presents an appropriate opportunity to clarify the ground rules for everyday disputes across America. The Ninth Circuit has invited tens of thousands of local governments within its borders to take utility franchise rights without compensation. Its rule eliminates the government's incentive to avoid or mitigate conflicts with prior users of the streets. And the ultimate losers in this case would be the millions of ratepayers across southern California who are forced to subsidize a short transit line in Santa Ana. See C.A. E.R. 155. Absent this Court's review, such unjust and unconstitutional cross-subsidization could be replicated many times over across the western United States.

C. The petition is an ideal vehicle for the Court's review. Both courts below applied the Takings Clause to the parties' joint stipulation of undisputed facts and

their cross-motions for summary judgment. App., *infra*, 27a. For that reason, no disputed facts could impede resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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