No. 25-1163

IN THE

Supreme Court of the United States

CARLOS PENA,

Petitioner,

v.

CITY OF LOS ANGELES, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE AND OWNERS COUNSEL OF AMERICA SUPPORTING PETITIONER

MICHAEL M. BERGER
Counsel of Record
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4185
mmberger@manatt.com

Counsel for Amici Curiae Small Property Owners of San Francisco Institute and Owners Counsel of America

121082

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Cited Authorities

Page

Other Authorities

Page

Page

INTERESTS OF AMICI CURIAE

The Small Property Owners of San Francisco Institute ("SPOSFI") is a California nonprofit corporation (Internal Revenue Code § 501(c)(3)) and organization of small property owners that advocates for the rights of property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and its membership cuts across all racial, ethnic, and socio-economic strata.[1]

SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive regulations harm both tenants and landlords, and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. Through legal advocacy, SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations.

SPOSFI has appeared as amicus curiae in this Court in support of petitions seeking to protect the rights of property owners.[2]

---

1. No counsel for any party has authored this brief in whole or in part and no person other than the amici has made any monetary contribution to this brief 's preparation or submission. The parties were timely notified of intent to file.

2. Simultaneously with the filing of this brief, these amici have filed a brief in *Hadley v. City of South Bend*, no. 25-1158. The two cases raise related issues, and the two briefs apply to both cases.

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA brings unique perspective to this case. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA seeks to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including most recently *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Sackett v. EPA*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. San Francisco*, 594 U.S. 474 (2021); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).[3] OCA members have also

3. For earlier cases handled by OCA members, see *Knick v. Township of Scott*, 588 U.S. 180 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Horne v. U.S. Dept. of Agriculture*, 576 U.S. 350 (2015), and *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S.

authored and edited treatises, books, and law review articles on property law and property rights.[4]

---

7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Preseault v. ICC*, 494 U.S. 1 (1990); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

4. *See, e.g.*, Michael M. Berger, *Theft, Extortion, and the Constitution: Land Use Practice Needs an Ethical Infusion*, 38 Touro L. Rev. 755 (2023); Michael M. Berger, *Whither Regulatory Takings*, 51 The Urban Lawyer 171 (2021); Michael M. Berger & Gideon Kanner, *The Nasty, Brutish And Short Life Of* Agins v. City Of Tiburon, 50 The Urban Lawyer 9 (2019); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on Prelitigation Process and Flooding and Erosion).

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fundamentally errs by focusing on the good faith of the police officers and the necessity for them to act to protect the public from the armed fugitive who had forced Pena out of, and then barricaded himself in, Pena's shop. In so doing, the court sought to raise some distinction between the police power and the eminent domain power, with the former apparently grounded in good faith and necessity. That good faith necessity grounding of the police power was then said to create an "exception" to the just compensation guarantee underlying the eminent domain power.

However, that creates a distinction that does not exist in our constitutional law. The central fact (which the opinion failed to recognize) is that the police power and eminent domain power cannot be so simplistically segregated. They are, in fact, merely two sides of the same coin of governmental power. The core of *both* the police power and the eminent domain power is identical: In either case, the government must act in furtherance of the public good and for a public purpose. This Court put it succinctly:

> "The [eminent domain] 'public use' requirement is thus *coterminous* with the scope of a sovereign's police powers." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (emphasis added).

Newer authority echoes that conclusion: "the Takings Clause *presupposes* that the government has acted in pursuit of a valid public purpose." *Lingle v. Chevron,*

U.S.A., Inc., 544 U.S. 528, 543 (2005) (emphasis added). So saying, *Lingle* overturned that part of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that had immunized from takings claims regulations that "substantially advance" legitimate state interests. Jettisoning that erroneous idea (which is close to the conclusion of the Ninth Circuit here), this Court concluded that *all* takings must "substantially advance" a governmental purpose if they are to qualify as "public uses" in the first place. 544 U.S. at 542-43.

Thus, to relieve the City of constitutional liability because of the good faith actions of its officers relies on a nonexistent dichotomy about good faith and necessity. Both are as central to the eminent domain power as they are to the police power, so relying on them to set the two powers apart makes no sense.

ARGUMENT

I. There Is No "Good Faith" Exception To The Fifth Amendment

The Fifth Amendment's just compensation requirement is categorical: The sovereign's authority to take private property exists *only* to the extent that the taking is necessary for public use. Indeed, the Court emphasized recently that when the government takes property, it must always pay just compensation. *Knick v. Twp. of Scott*, 588 U.S. 180, 190 (2019) ("a property owner has a Fifth Amendment entitlement to compensation *as soon as the government takes his property* without paying for it"; emphasis added). Or, as the Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), government action that prevents all "economically

beneficial or productive use" of property is a *per se* taking requiring compensation. That plainly is what happened to Pena when the SWAT team destroyed his ability to continue using what had been a very productive print shop.

In such circumstances, the Constitution requires no balancing or weighing of interests. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)). As the Court summarized in *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021):

> "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, [p]roperty must be secured, or liberty cannot exist.' [Citation]. This Court agrees, having noted that protection of property rights is 'necessary to preserve freedom' and '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 (2017)."

This is plainly one of those cases the Court had in mind when it spoke of "governments . . . always [being] eager" "to shape and to plan" a property owner's destiny. Seeking to hide behind the conceded necessity of apprehending an armed criminal, the city asserts the right to destroy private property in order to do so—and to be wholly free

of any consequences. More than that, it asserts the right to foist all the consequences onto a concededly innocent property owner who had nothing to do with either the criminal or his crime. That cannot comport with the Constitution. Yet the Ninth Circuit accepted it.

II. Even Legitimate Government Actions Can Require Compensation When They Impress Private Property Into Public Service.

The government defended itself below by claiming that its focus on protecting the public was legitimate. The Ninth Circuit adopted that rationale. The question, however, is whether legitimacy should count for anything in this constitutional analysis? In a word, no.

The decision proceeds as though recognition of a legitimate governmental *goal* validates whatever *solution* is chosen. Not relevant. Determination of a legitimate governmental objective is the first, not the last, step. The law distinguishes between means and ends, and the means chosen to achieve the objective must survive Constitutional scrutiny the same as the ends.

Legitimate goals are constitutionally irrelevant. For the proper exercise of *any* governmental power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when the Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of *both* police power *and* eminent domain were present:

> "We assume, *of course*, that the statute was passed upon the conviction that an exigency existed that would warrant it, *and* we assume that an exigency exists that would warrant the exercise of eminent domain. *But the question at bottom is upon whom the loss of the changes desired should fall.*"[5]

After determining that government action was done to achieve a legitimate goal, the means chosen must be constitutionally examined to ensure that private rights have not been violated. Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what the Court meant when it concluded in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987) that:

> "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them."

Pennsylvania Coal was merely one in a long line of decisions authored by diverse Justices in which the Court explained to government agencies that the general legal propriety of their actions and the need to pay compensation

---

5. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (emphasis added). *See also Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest. . . ."

under the Fifth Amendment present different questions, and the need for the latter is not obviated by the legitimacy of the former.

The Ninth Circuit, however, seems not to have gotten the message. Evidently believing that the government was pursuing the public good, it ended its analysis at that point. Demonstrating the error of that theory, the *dissenting* opinion in *Pennsylvania Coal* had argued *precisely the same*, saying that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."[6] Eight Justices rejected that proposition more than a century ago.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, New York's highest court upheld a statute as a valid police power exercise and dismissed an action seeking compensation. This Court reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*"[7]

Similarly, in *Kaiser Aetna v. United States*, the Corps of Engineers decreed that a private marina be opened to public use without compensation. The Court reversed, explaining:

---

6. 260 U.S. at 417 (Brandeis, J. dissenting).

7. 458 U.S. 419, 425 (1982) (Marshall, J.) (emphasis added).

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question."[8]

Or, as the Court put it in *Nollan*:

> "That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.'"[9]

That is why the Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper* interference amounting to a taking."[10]

---

8. 444 U.S. 164, 174 (1979) (Rehnquist, J.) (emphasis added).

9. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) (Scalia, J.).

10. 482 U.S. at 315 (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added).

In cases like these, the Court has directed the property owners to the Court of Federal Claims to determine whether these exercises of government power, *though substantively legitimate*, nonetheless required compensation.

> "In such cases the characteristic feature is the defendant's use of *rightful* . . . regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[11]

In sum, for a taking to occur, it matters not whether government officials acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. The Court put it succinctly when it concluded that the Takings Clause "focuses directly upon the severity of the burden that government imposes upon private property rights"—not the importance of the governmental interest advanced by the taking. *Lingle*, 544 U.S. at 539.[12]

Indeed, if government motives are benign—or done for the best of reasons—that only fortifies the need for compensation required by the Just Compensation guaranty.

---

11. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting with approval; emphasis the Court's).

12. *See Hughes v. State of Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Stewart, J., concurring) (emphasis added).

Shortly after the Ninth Circuit filed its opinion here, the Eleventh Circuit decided *Alford v. Walton County*, 159 F.4th 844 (11th Cir. 2025). There, that court concluded, in finding liability for regulations enacted during the COVID emergency, that "the normal requirements of the Takings Clause remain in force, even during emergencies." *Id.* at 860.

Thus, it is not enough to conclude that it is a good thing to protect the populace from gangsters and thugs. As a matter of Constitutional policy, severe invasions of protected property rights cannot occur unless compensation is paid. If Los Angeles believes that its action is otherwise worthwhile then, as the Court put it in *Nollan*, "it must pay for it." 483 U.S. at 842.

III. When The Government's Interests Are Financial, Its Actions Must Be Viewed With Skepticism.

Underlying the Court's conclusion that Constitutional decisions necessarily impinge on the freedom and flexibility of government agencies (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)) was undoubtedly the Court's repeated recognition that, when the governmental interest is financial, its actions must be viewed warily. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. *A governmental entity can always find a use for extra money. . . .*" (emphasis added); *United States v. Good Real Property*, 510 U.S. 43, 55-56 (1993) (careful examination "is of particular importance . . . where the Government has a direct

pecuniary interest in the outcome of the proceeding"); *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (concerns regarding "statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties").

The lower courts were concerned that finding government liability here would overstrain municipal budgets. Irrelevant. Indeed, the Court's jurisprudence rebels at the thought. "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." *Ark. Game & Fish*, 568 U.S. at 36. The Court has consistently "rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction." *Id.* at 37 ("While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases."); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared." (internal quotation marks omitted)).

As the late Professor Gideon Kanner, a preeminent star in the takings firmament, put it, "it seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens

from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa." (Gideon Kanner, *Just How Just is Just Compensation?* 48 Notre Dame L. Rev. 786, 784 (1973).)

Owners' rights to be secure in their property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 565 U.S. 400, 405 (2012), the Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property." This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324 (1893) (followed by *Olson v. United States*, 292 U.S. 246, 254 (1934)).

Our Constitution provides a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide more, but never less protection. *Simmons v. South Carolina*, 512 U.S. 154, 174 (1994); see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Justice Kavanaugh explained it this way: "the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other . . . government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." *American Legion v.*

American Humanist Assn., 139 S.Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

When the government takes an owner's property the government has a "categorical duty" to comply with the Fifth Amendment. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); *Horne v. Dept. of Agriculture*, 576 U.S. 350, 362 (2015). The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325. As the Court reiterated recently, "[b]y requiring the government to pay for what it takes, the Takings Clause saves individual property owners from bearing 'public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sheetz v. County of El Dorado*, 601 U.S. 267, 273-74 (2024) In other words, cash may not heal all wounds, but it is a constitutionally acceptable remedy for unconstitutional government action.

CONCLUSION

Certiorari should be granted, the result overturned, and the law rationalized. There are no exceptions to the Fifth Amendment's just compensation guaranty when property is taken for a public purpose. The burden of such takings should be shouldered by the community as a whole, and this Court should make that clear.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4185
mmberger@manatt.com

Counsel for Amici Curiae
Small Property Owners of
San Francisco Institute and
Owners Counsel of America