No. 15-330

In the

Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE, et al.

Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

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

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QUESTIONS PRESENTED

1. Does the State have freedom to take property without compensation as a condition of a development permit approval when it acts pursuant to its general police power and is not mitigating harm that would be caused by the development?

2. When a city creates a housing cost problem, may it seek to solve that problem by singling out housing developers to give the city an interest in the developed property as a condition to gaining approval for the development?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties of use and ownership of private property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing property rights, including *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010). The Center believes that individual rights in private property were at the core of the individual liberties sought to be protected by the Founders in the Constitution and the Bill of Rights. Indeed, the Founders viewed individual liberty in property as the basis for other rights.

SUMMARY OF ARGUMENT

California's marked antipathy toward individual rights in property appears to be a long-standing and

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given notice amicus's intent to file at least 10 days prior to the filing of this brief and all parties have consented to the filing of this brief. Petitioner filed a blanket consent and the consents from respondents have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

official policy of the state. This Court has reviewed (and reversed) California state court decisions that purported to withdraw the protections of the Takings Clause from California property owners and that gave the state the power to confiscate property without compensation as a condition for a permit approval. These state policies are antithetical to the notion of individual liberty enshrined in the federal constitution. This Court is called on once again to reject California's apparent view that the state can demand property in exchange for a development permit even where the conditions have no relation to the development project.

It is true that the City of San Jose and other coastal California cities have a serious housing affordability problem. However, that problem is largely on of those cities' own creation. That problem of affordability will not be cured by the confiscatory ordinance at issue in this case, nor should the burden of solving affordability be foisted onto innocent individual property owners. The city boldly concedes that the problem it seeks to resolve here is not one of the homebuilders' making. That admission, however, dooms the city's defense. Under the ordinance, the city gains an interest in the property and a share in the profit of the resale of any of the "affordable" units. This Court should grant review to put to rest California's argument that it has a police power authority to require the surrender of property as a condition of obtaining a permit to build homes.

REASONS FOR GRANTING REVIEW

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

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

The California Supreme Court reaffirmed the holding of *Ayers* in *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633 (1971). There the court ruled that local government could demand that home builders give up a portion of their property for recreational facilities even if the development did not create a need for those facilities. The court ruled that the exaction "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions." *Id.* at 638. The court based its ruling on the finding that "[u]ndeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure." *Id.* at 641. In the view of California, this limited resource belongs to the state – or at least the people in common – rather than the property owner. In later cases, the Califor-

nia court even sought to protect cities demanding these exactions from the Fifth Amendment requirement that a Taking of property requires compensation. Even where the exaction is unconstitutional, the California court ruled that no compensation was available. *Agins v. City of Tiburon*, 23 Cal. 3d 605, 272 (1979) *aff'd*, 447 U.S. 255 (1980) *abrogated by First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

In this case, the California Supreme Court relied on *Ayers* and *Associated Home Builders* to rule that "so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible." *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 455 (2015). This is the same rationale that this Court rejected in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, the California court had ruled (as the California Supreme Court ruled in the instant case) "the justification for required dedication is not limited to the needs of or burdens created by the project." *Nollan v. California Coastal Com.*, 177 Cal. App. 3d 719, 723 (1986) *rev'd sub nom. Nollan v. California Coastal Comm'n*, *supra.* This Court ruled, however, that the Nollan family could not be singled out "to bear the burden of California's attempt to remedy" existing problems. *Nollan*, 483 U.S., at 867 n.4. Indeed, this Court noted that its rejection of the California argument was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." *Id.*, at 839-40.

This case demonstrates that California continues to be an "outlier" on the issue of individual rights in property. The state's approach that necessary government permits constitute the grant of "advantage" for which the state can demand a portion of the property stands in stark contrast to the notion of liberty enshrined in the United States Constitution.

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

Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property. Those protections, however, were also firmly grounded in the Founder's theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. 1 Stat. 1 (Declaration of Independence ¶2). The Fifth

Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

Of course, the importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (1644) (William S. Hein Co. 1986)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that our founders brought with them to America.

The founding generation also relied on the writings of John Locke, who noted that private property was natural, inseparable from liberty in general, and actually preceded the state's political authority. John Locke, SECOND TREATISE OF GOVERNMENT, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (Oxford Univ. Press, 2nd Ed. 1998). Locke argued that government was formed to protect "life, liberty, and estates" and Thomas Jefferson merely substituted 'estates' with 'pursuit of happiness' in the Declaration. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (Univ. North Carolina Press 1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "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). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders 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 re-

striction 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* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS CONSTITUTION (Philip B Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

This Court has recognized the fundamental nature of these property rights. Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (CCED PA 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.* This Court has followed Justice Washington's view, noting that constitutionally protected rights in property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights.")

Individual rights in private property are foremost among those individual rights "which have at all times been enjoyed by citizens of the several States." *Slaughter-House Cases*, 83 U.S. 36, 74 (1872).

According to this Court, the stress here is on individual rights. "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch*, 405 U.S., at 552. In *Lynch*, this Court noted the long recognition of these rights as "basic civil rights" from the writings of Locke through the adoption of the

Fourteenth Amendment and the Civil Rights Acts. *Id.*

The fundamental nature of individual rights in property has been noted in other cases as well. When this Court has wanted to express the fundamental nature of a civil right under the Fourteenth Amendment it has used rights in property as an example. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), for example, this Court noted the rights to "life, liberty, *and property*" were among the rights so fundamental that they "may not be submitted to a vote." *Id.* at 638; *see*, *e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 234-35 (1971); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736 (1964).

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890).

Moreover, the individual right in property is not in mere ownership. Instead, this Court has noted that the right in property is the right to use that property. *Nollan*, 483 U.S., at 833 n.2 (1987); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). California, however, is openly hostile to this notion of individual rights in property. According to the court below, the state asserts a police power to condition the use of property on confis-

catory exactions that are unrelated to any problems created by the proposed use of the property. Review is necessary to bring California in line with other state and federal decisions upholding individual rights in private property under the Constitution.

II. California Cannot Solve a Problem of its Own Creation through Confiscatory Conditions on Property Development.

A. The housing affordability crisis in California was created and is sustained through government land-use policies.

There is no doubt that San Jose has a housing affordability problem. There is also no doubt that it is a problem of San Jose's own making. Three months before the California Supreme Court issued its decision in this case, the California Legislative Analyst's Office issued a comprehensive report entitled: California's High Housing Costs, Causes and Consequences. The report confirms that cost of housing in California – especially in the urban coastal areas like San Jose – far exceeds the cost of housing elsewhere in the nation. According to the report, the average price of a home in San Jose is $843,000. This is more than four times the national average home price. Legislative Analyst's Office, California's High Housing Costs, Causes and Consequences, March, 2015 at 8.

The most striking finding in the Legislative Analyst's report is the cause of this disparity in housing costs. High building costs due to regulation and development fees are only a small part of the problem. *Id*. at 14. The national average for government fees

on development is about $6,000 per home compared to more than $22,000 per home in California. *Id*. The real culprit, however, is that "far less housing has been built in California's coastal metro areas than people demand." *Id*. at 10. This lack of housing supply is a direct result of growth controls, zoning regulations, and general opposition to new development in the coastal metro areas like San Jose. *Id*. at 15-17. Housing is more expensive in San Jose because San Jose does "not have sufficient housing to accommodate all of the households that want to live there," and that lack of sufficient housing is the direct result of San Jose's own policies. *Id*. at 10, 15-17. New housing does not contribute to the problem, it contributes to the solution.

B. The San Jose ordinance imposes a confiscatory condition to permitting new development. The city's argument that it seeks to cure problems not caused by the development does not entitle the ordinance to less exacting review.

The California Supreme Court acknowledged that one feature of the San Jose ordinance is that the city will gain an interest in the houses that home builders are required to sell at below market rates. *California Building Industry Ass'n*, 61 Cal. 4th at 451. This interest, similar to a deed of trust, will ensure that the original purchaser-beneficiary of the below-market mandate cannot simply flip the property in a windfall profit sale for its true market value. *Id*. Indeed, under the ordinance the city claims a portion of the property appreciation for itself. *Id*., at 451-52. Nonetheless, the California court concluded

that this scheme transferring property to the City "does not effect an exaction." *Id.*, at 457. That the City in fact ends up with an interest in the land and a share in the profit on resale apparently was not relevant to the California Supreme Court's analysis.

In any event, the California court concluded that this Court's precedents concerning unconstitutional conditions did not apply to this scheme because the San Jose ordinance was a "broad zoning law." *Id.* at 474. That is, the state supreme court admitted that the ordinance had nothing to do at all with any burdens created by the development of new housing. Instead, this is a regulation "to serve the legitimate interests of the general public and the community at large." *Id.*, at 461.

This is precisely the argument that California made (and that this Court rejected) in *Nollan*. A principal purpose of the Fifth Amendment's Takings Clause is "to 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). Thus California's argument that it can single out property owners wishing to build new housing to solve the public burden of affordable housing is foreclosed by the Constitution. *Nollan*, 483 U.S. at 867 n.4. The simple argument that the public interest will be served by this ordinance is no defense to the Takings Clause. Paraphrasing this Court's ruling in *Nollan*, the city may be right that the low-income housing requirement is a good idea, but that does not establish that residential homebuilders "alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive pro-

gram,' if it wishes, by using its power of eminent domain for this 'public purpose,' … but if wants … [the homebuilders'] property, it must pay for it." *Id*., at 841-42.

CONCLUSION

The Court should grant the petition for writ of certiorari to resolve the conflicts between the California decision and the decisions of this Court and state and federal courts.

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Respectfully submitted,

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