IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S230104

JAIME A. SCHER, et al.,
Plaintiffs, Appellants and Respondents,

v.

JOHN F. BURKE, et al.,
Defendants, Appellants and Respondents.

After an Opinion by the Court of Appeal,
Second Appellate District, Division Three
(Case No. B235892)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC415646, Honorable Malcolm H. Mackey, Judge)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE BURKE DEFENDANTS AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

IDENTITY AND INTEREST OF AMICI CURIAE 1

AMICUS CURIAE BRIEF 4

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. CALIFORNIA'S DOCTRINE OF IMPLIED-IN-LAW PUBLIC DEDICATION IS UNCONSTITUTIONAL BECAUSE IT ALLOWS PRIVATE PROPERTY TO BE TAKEN FOR PUBLIC USE WITHOUT COMPENSATION 6

II. THE LEGISLATURE REPUDIATED IMPLIED-IN-LAW DEDICATION FOR GOOD REASON AND THIS COURT SHOULD RESPECT THAT DECISION 15

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Application of Banning, 832 P.2d 724 (Haw. 1992) 18

Bonner v. Sudbury, 417 P.2d 646 (Utah 1966) 17

Bustillos v. Murphy, 96 Cal. App. 4th 1277 (2002) 6, 18

Carr v. Hopkin, 556 P.2d 221 (Wyo. 1976) 17

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897) 7

City & County of San Francisco v. Grote, 120 Cal. 59 (1898) 9-10

City of Laguna Beach v. Consolidated Mortg. Co.,
68 Cal. App. 2d 38 (1945) 8

City of Manhattan Beach v. Cortelyou, 10 Cal. 2d 653 (1938) 8

City of San Diego v. Hall, 180 Cal. 165 (1919) 8

City of Scottsdale v. Mocho, 444 P.2d 437 (Ariz. Ct. App. 1968) 17

Cooper v. Monterey County, 104 Cal. 437 (1894) 9-10

County of Los Angeles v. Berk, 26 Cal. 3d 201 (1980) 12-13, 15-16

County of Orange v. Chandler-Sherman Corp.,
54 Cal. App. 3d 561 (1976) 14

Cummins v. King County, 434 P.2d 588 (Wash. 1967) 17

Dep't of Natural Resources v. Mayor and Council of Ocean City,
332 A.2d 630 (Md. 1975) 17

Diamond Match Co. v. Savercool, 218 Cal. 665 (1933) 9

F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436 (1915) 8

Page

Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970) 11-14

Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) 17

Hanshaw v. Long Valley Road Association,
116 Cal. App. 4th 471 (2004) 6, 18

Hare v. Craig, 206 Cal. 753 (1929) 9

Hartley v. Vermillion, 141 Cal. 339 (1903) 9

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013) 1-2

Laug v. Ottowa County Road Comm'n,
195 N.W.2d 336 (Mich. Ct. App. 1972) 17

Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc.,
41 Cal. 4th 954 (2007) 2

Miller v. Roy W. Heinrich & Co., 476 P.2d 183 (Or. 1970) 17

Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court,
40 Cal. 4th 648 (2007) 2

Niles v. City of Los Angeles, 125 Cal. 572 (1899) 7-8

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) 2

O'Banion v. Borba, 32 Cal. 2d 145 (1948) 12

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 2

People v. Myring, 144 Cal. 351 (1904) 9

Pulido v. Pereira, 234 Cal. App. 4th 1246 (2015) 6, 18

Quinn v. Anderson, 70 Cal. 454 (1886) 8

Schwerdtle v. Placer County, 108 Cal. 589 (1895) 9-10

Page

Shia v. Pendergrass, 72 S.E.2d 699 (S.C. 1952) 17

State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979) 16-17

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 2

Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235 (1954) 9-11

Whiteman v. City of San Diego, 184 Cal. 163 (1920) 8

Constitutions

U.S. Const. amend. V 7

Cal. Const. art. I, § 19 7

Statutes

Civ. Code § 1009 (1972) 6

§ 1009(b) 15-16

§ 1009(c) 16

Rules

Cal. R. Ct. 8.520 1

Cal. R. Ct. 8.520(f) 1

Miscellaneous

Armstrong, Thomas K., *Gion v. City of Santa Cruz: Now You Own It Now You Don't; or The Case of The Reluctant Philanthropist*, 45 L.A. Bar Bull. 529 (1970) 15

Berger, Michael M., *Nice Guys Finish Last—At Least They Lose Their Property:* Gion v. City of Santa Cruz, 8 Cal. Western L. Rev. 75 (1971) 15

Page

Bruce, Jon W. & Ely, James W., Jr., *The Law of Easements and Licenses in Land* (2008) 11

Comment, *Implied Dedication: A Threat to the Owners of California's Shoreline*, 11 Santa Clara Law. 327 (1971) 15

Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L. Rev. 795 (1971) 15

Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 So. Cal. L. Rev. 1092 (1971) 15

Note, 59 Cal. L. Rev. 231 (1971) 15

Note, *Californians Need Beaches—Maybe Yours!*, 7 San Diego L. Rev. 605 (1970) 15

Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 Cal. Western L. Rev. 259 (1970) 15

Note, *Public Access to Beaches*, 22 Stan. L. Rev. 564 (1970) 15

Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner*, 4 Loyola L.A. L. Rev. 438 (1971) 15

INTRODUCTION

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association request leave to file the attached amicus curiae brief in support of Defendants, and in support of affirmance of the decision below. Amici are familiar with the arguments and believe that the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington, Washington, D.C., and Palm Beach Gardens, Florida.

Since its founding, PLF has been a leading voice for property rights, and has participated in numerous cases in the California courts and the United States Supreme Court. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*,

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[1] Pursuant to California Rule of Court 8.520, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no person other than Amici Curiae, their members, and their counsel made a monetary contribution to the brief's preparation or submission.

133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 40 Cal. 4th 648 (2007); and *Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc.*, 41 Cal. 4th 954 (2007).

PLF and its supporters believe that this case is of significant importance to California's landowners and has far-reaching implications for their property rights. PLF believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

The California Farm Bureau Federation (Farm Bureau) is a nongovernmental, nonprofit, voluntary membership California corporation. Its purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing nearly 57,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. To that end, Farm Bureau is involved in efforts to protect the resources of the state, including air and water quality and the preservation of agricultural land. Farm Bureau also

actively participates in state and federal legislative and regulatory advocacy relating to the protection of private property rights on behalf of its members.

This case raises issues of vital concern to the membership of Farm Bureau. Specifically, Farm Bureau members have a proprietary interest in their farming operations and the ability to use the land and soil to produce crops without the interference caused by public rights of access to or through agricultural land. Because the members of Farm Bureau have a substantial interest in minimizing the unnecessary taking of agricultural land, and ensuring that questions regarding just compensation are resolved properly and adjudicated consistently, Farm Bureau respectfully joins in this brief.

The California Cattlemen's Association is a mutual benefit corporation organized under California law in 1923 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the industry. Membership in the California Cattlemen's Association is open to any person or entity engaged in breeding, producing, maturing or feeding of cattle, or who leases land for cattle production. The California Cattlemen's Association is the leading organization of cattle grazers in California. Acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. The livelihood of California's ranchers depends on their management of vast expanses of land. California Civil Code section 1009 protects ranchers from having to police public access onto that land at the risk of forever losing the right to exclude the public from land and

private roads used for ranching operations. The members of the California Cattlemen's Association thus have a significant interest in seeing that the broad protections of Section 1009 are upheld, and that the unconstitutional seizure of private property for public use without compensation is minimized or eliminated in California, and not encouraged.

The proposed amicus brief argues that the lower court decision should be affirmed because it faithfully and correctly interpreted Section 1009 as broadly banning the unconstitutional doctrine of implied-in-law public dedication.

AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

The doctrine of implied-in-law public dedication is unsound and unworthy of recent efforts to resurrect it. The United States and California constitutions recognize that private property may not be taken for public use without compensation. Absent compensation, the public may only acquire permanent rights in private property through the owner's voluntary abandonment or dedication of his property. In claims of dedication, a rigorous inquiry into intent is essential to preserve property rights. California's doctrine of implied-in-law dedication is inherently problematic because it allows the public to take permanent rights in private property under circumstances where the owner's intent to dedicate is at best ambiguous.

This results in reversing evidentiary burdens in dedication claims in a manner repugnant to the fundamental principles of property rights protected by the United States and California constitutions. Putting the burden on owners to protect their property rights from uncompensated public appropriation forces them to exclude the public from their land if they want to keep it. The Legislature enacted Section 1009 to prevent precisely this predictable consequence of implied-in-law dedication. In doing so, Section 1009 unambiguously repudiates California's implied-in-law public dedication doctrine in non-coastal areas using broad, unqualified terms. Nevertheless, some California courts have adopted strained readings of the statute's text to minimize—and, effectively, to nullify—California's preference for property rights that are secure enough to share with neighbors without danger of uncompensated loss. This Court should reject those narrow readings and affirm the decision below, which was faithful to the plain meaning of the statute.

ARGUMENT

I

CALIFORNIA'S DOCTRINE OF IMPLIED-IN-LAW PUBLIC DEDICATION IS UNCONSTITUTIONAL BECAUSE IT ALLOWS PRIVATE PROPERTY TO BE TAKEN FOR PUBLIC USE WITHOUT COMPENSATION

California's common law doctrine of implied-in-law public dedication allowed the public to take and use private property without compensation, regardless of the owner's actual intent to dispose of that property. Through this doctrine's case law, California courts redefined voluntary dedication to include not just what an owner voluntarily gives to the public, but also whatever the public can take from an open-handed and unsuspicious landowner. This doctrine created un-neighborly and perverse incentives, and destabilized property rights. The Legislature broadly repudiated the doctrine in Civ. Code § 1009 (1972), but some California appellate courts have undermined that broad repudiation by reading the statute narrowly. *See Hanshaw v. Long Valley Road Association*, 116 Cal. App. 4th 471 (2004) (holding Section 1009 inapplicable to non-recreational land), *Bustillos v. Murphy*, 96 Cal. App. 4th 1277, 1280-81 (2002) (reading Section 1009 to apply only to recreational use), and *Pulido v. Pereira*, 234 Cal. App. 4th 1246, 1250 (2015) (inserting language from Section 1009's preamble into its operative subsection to limit its application to recreational use). The doctrine of implied-in-law public

dedication is unsound, and this Court should reject Plaintiffs' invitation to defy the Legislature's will by breathing new life into it.

For private property to be taken for public use, one of two things must occur: the owner must voluntarily relinquish his rights, or the public must compensate the owner. The Fifth Amendment forbids that "private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fourteenth Amendment incorporates this protection against the states. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 228 (1897). The California Constitution also protects property owners from uncompensated takings: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Cal. Const. art. I, § 19. California's common law has long recognized just two circumstances in which the public may claim rights in private property without requiring compensation for the owner. *Niles v. City of Los Angeles*, 125 Cal. 572, 576 (1899) ("The law does not allow the land of a private owner to be taken for public purposes without any conveyance or consideration, except upon proof of such facts and circumstances *as clearly show an intention on the part of the owner* to abandon or dedicate the land to the public." (emphasis added)). Whether through abandonment or dedication, only the owner's voluntary relinquishment of dominion prevents the diminishment of property rights from being an involuntary "taking." Simply put, one who loses property

rights to the public has either given them away, or has had them taken from him.

Therefore, the intent of the owner is the indispensable element in distinguishing between whether a dedication or a taking has occurred. A dedication may be found expressly in writing or implied "when the acts and conduct of the owner indicate clearly an intention to devote the land to the public use." *City of Laguna Beach v. Consolidated Mortg. Co.*, 68 Cal. App. 2d 38, 43 (1945). But intent remains a question of fact to be drawn from each particular set of circumstances. It is "never presumed without evidence of unequivocal intention." *Niles*, 125 Cal. at 578 (citing *Quinn v. Anderson*, 70 Cal. 454, 456 (1886)). Intent may be inferred from long acquiescence, but "it will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own." *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 448 (1915).

For a time, this Court's decisions, like in *Niles* and *Hihn*, required real evidence, rather than presumptions, to establish an implication of intent to dedicate property. *See City of Manhattan Beach v. Cortelyou*, 10 Cal. 2d 653, 668 (1938); *Whiteman v. City of San Diego*, 184 Cal. 163, 172 (1920); *City of San Diego v. Hall*, 180 Cal. 165, 167-68 (1919). However, another line of this Court's cases allowed an alternative means of establishing that implication. These cases held that where the public establishes elements of a prescriptive right in private property—long and continuous adverse use—the owner's

consent to dedicate his land to the public for that use will be presumed as a "conclusion of law." *See Schwerdtle v. Placer County*, 108 Cal. 589, 596 (1895); *but see Cooper v. Monterey County*, 104 Cal. 437, 438 (1894) ("The finding that the strip of land in question was traveled and used by the public ever since 1872, with the knowledge of plaintiff and without objection on his part, is . . . not necessarily inconsistent with a total absence of intention to dedicate, and may indicate merely a license.").

By the time this Court decided *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 241 (1954), the *Schwerdtle* "implied-in-law" dedication doctrine had become firmly entrenched in this Court's decisions. *See Hare v. Craig*, 206 Cal. 753, 757 (1929); *People v. Myring*, 144 Cal. 351, 354 (1904); *Hartley v. Vermillion*, 141 Cal. 339, 349 (1903). This doctrine states that,

> where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license.

Union Transp., 42 Cal. 2d at 241 (quoting *Diamond Match Co. v. Savercool*, 218 Cal. 665, 669 (1933)).

Implied-in-law dedication is, of course, incompatible with the notion that "an intention to dedicate upon the part of the owner must be plainly manifest" before any dedication can be found. *See City & County of*

San Francisco v. Grote, 120 Cal. 59, 62 (1898). To harmonize these incompatible views, *Union Transportation*, like *Schwerdtle*, simply relegated the requirement of the owner's manifest intent to a limited set of dedication claims—those where "dedication is sought to be established by a use which has continued a short time—not long enough to perfect the rights of the public under the rules of prescription." *Union Transp.*, 42 Cal. 2d at 241 (quoting *Schwerdtle*, 108 Cal. at 593). These came to be known as "implied-in-fact" claims.

Thus, in place of the "actual" evidence of consent required by implied-in-fact dedication, implied-in-law dedication presumes it constructively, as a legal fiction, wherever public use is continuous and adverse over the length of five years. *Id.* The reasoning behind the doctrine suggests that the adverse nature of use is sufficient to "negative[] the idea of a mere license," as it is the long and continuous nature of the use that establishes the presumption of the owner's knowledge. *See id.* But long-continued public use alone is compatible with long-continued public license. *Cooper v. Monterey County*, 104 Cal. at 438. Nevertheless, knowledge and acquiescence in the "adversity" of use gives rise to the conclusive presumption that the landowner wished his rights sacrificed to the public use.

Therein lies the flaw of implied-in-law dedication—it makes a Kafkaesque absurdity of the distinction between giving and taking. The primary question of dedication should be whether something has been

voluntarily given. The question cannot be answered by looking only to the behavior of the receiver.[2] Yet implied-in-law dedication purports to do precisely this, notwithstanding evidence that the owner did not intend to dedicate. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 44 (1970) (consolidated with *Dietz v. King*) (hereinafter *Gion-Dietz*) ("The activities of the . . . proprietors in occasionally collecting tolls had no effect on the public's rights in the property because the question is whether the public's use was free from interference or objection . . . ."). Thus, a member of the public can make a successful claim of implied public dedication without providing any evidence of the owner's intent to dedicate, much less clear and unequivocal evidence of such, and upon this showing the owner's property rights are presumed to be forfeited. *See Union Transp.*, 42 Cal. 2d at 241. To this line of inquiry, the fact of the property owner's actual intent to dedicate is, and was at all points, irrelevant. *Gion-Dietz*, 2 Cal. 3d at 44.

Therefore, the constitutionality of implied-in-law dedication was already highly questionable by the time the consolidated cases *Gion v. City of Santa Cruz* and *Dietz v. King*, 2 Cal. 3d 29, reached this Court. The extreme position this Court took in *Gion-Dietz* removed any doubt.

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[2] Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 4:38 (2008) ("Focusing solely on the intent and activities of the public is inconsistent with the fundamental notion that dedication is predicated on a landowner's express or implied intent to donate property to the public.").

While ostensibly drawing from longstanding principles of implied dedication, *Gion-Dietz* departed sharply from precedent in several respects. *See County of Los Angeles v. Berk*, 26 Cal. 3d 201, 225-27 (1980) (Clark, J., dissenting). Most controversially, it was the first case to use implied-in-law dedication—previously used only to create public rights in roadways—to establish the dedication of entire fees of shoreline property for public recreational use.[3] 26 Cal. 3d at 226-27.

To do so, *Gion-Dietz* directly overturned the long-held presumption announced in *Hihn* that public use of land for recreational purposes is presumed to derive from the owner's license. *Gion-Dietz*, 2 Cal. 3d at 40-41. In doing so, the court misapplied this court's decision in *O'Banion v. Borba*, 32 Cal. 2d 145 (1948),[4] to overturn the presumption of license. *Gion-Dietz*, 2 Cal. 3d at 39. Then, the Court instead established a presumption in favor of the public:

> a personal claim of right need not be shown to establish a dedication because it is a public right that is being claimed. What must be shown is that persons used the property believing the public had a right to such use. This public use may not be

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[3] *Gion-Dietz* asserts that its use of the doctrine is not so novel, but none of the cases it cites as precedent employs implied-in-law dedication to transfer title to an entire fee for recreational purposes without evidence of the owner's consent. *See Gion-Dietz*, 2 Cal. 3d at 42. Each of the cases it cites is an implied-in-fact decision.

[4] *See Berk*, 26 Cal. 3d at 228 n.2 (Clark, J., dissenting) (arguing that *Gion-Dietz*'s application of *O'Banion* to implied-in-law dedication is inapposite).

> "adverse" to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication.

Id.

The burden of adversity thus changed from the public needing to prove use was adverse rather than by license, to landowners needing to prove public use was under license. This virtually eliminates the requirement of adversity in implied-in-law dedication claims. *See Berk*, 26 Cal. 3d at 227 (Clark, J., dissenting) ("[T]he traditional requirement of adversity was expressly eliminated, mere public use now being sufficient."). Under the traditional method of proving implied-in-law dedication, the owner's intent was only plausibly evidenced, if at all, by the adversity element. By eliminating any meaningful test of adversity, *Gion-Dietz* pushed the doctrine even further from having anything at all to do with the owner's intent to dedicate. *See id.*

Indeed, the factual pleading required to sustain a claim of implied-in-law dedication post-*Gion-Dietz* offers little if any probative value as to the owner's actual dedicative intent. Five years of public use without need for permission is as plausibly carried out under a license as under a dedication. Nevertheless, *Gion-Dietz* refused to require public claimants to offer proof of adversity of use beyond showing that the public in general did not ask permission and was not denied access. 2 Cal. 3d at 40. In short, *Gion-Dietz* established an unjustifiably easy test for determining when a

landowner "intended" to give his property to the public. In fact, the *Gion-Dietz* test goes so far as to preclude the consideration of what normally would be considered evidence relevant to determining a landowner's intent. *Id.* at 41. Accordingly, the doctrine of implied public dedication, post-*Gion-Dietz*, is much more about determining when it is appropriate to redistribute private property to the public, than it is about ascertaining a landowner's intent.

The expansion of implied-in-law public dedication in *Gion-Dietz* was not only bad property law; it was bad policy. The same policy purpose motivating *Gion-Dietz*'s judicial leap forward[5] was the policy the decision most immediately frustrated—public access to the California coast. By divorcing intent from dedication, *Gion-Dietz* imperiled property rights across the state. Property owners wishing to keep their property private ruthlessly had to shut out the public to avoid the loss of their property. *See County of Orange v. Chandler-Sherman Corp.*, 54 Cal. App. 3d 561, 564 (1976) (noting the "soaring sales of chain link fences, as owners of shoreline property frantically attempted to bar the public from the use of their property"). This was an entirely predictable—and in fact widely predicted—result. Legal commentators swiftly and widely panned the decision's poor legal foundation

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[5] *See Gion-Dietz*, 2 Cal. 3d at 42 ("Even if we were reluctant to apply the rules of common law dedication to open recreational areas, we must observe the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas.").

and its lack of policy forethought.[6] This Court can avoid these adverse consequences, as well as vindicate constitutional protections for property rights, by affirming the decision below.

II

THE LEGISLATURE REPUDIATED IMPLIED-IN-LAW DEDICATION FOR GOOD REASON AND THIS COURT SHOULD RESPECT THAT DECISION

In response to the public menace implied-in-law dedication had become, the California Legislature, through Section 1009, interred it. Section 1009 provides that "no use . . . by the public . . . shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication." Civ. Code § 1009(b). The statute provides that dedication to the

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[6] *See Berk*, 26 Cal. 3d at 228 (Clark, J., dissenting) (citing Thomas K. Armstrong, Gion v. City of Santa Cruz*: Now You Own It Now You Don't; or The Case of The Reluctant Philanthropist*, 45 L.A. Bar Bull. 529 (1970); Michael M. Berger, *Nice Guys Finish Last—At Least They Lose Their Property:* Gion v. City of Santa Cruz, 8 Cal. Western L. Rev. 75 (1971); Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 So. Cal. L. Rev. 1092 (1971); Comment, *Implied Dedication: A Threat to the Owners of California's Shoreline*, 11 Santa Clara Law. 327 (1971); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L. Rev. 795 (1971); Note, *Californians Need Beaches—Maybe Yours!*, 7 San Diego L. Rev. 605 (1970); Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 Cal. Western L. Rev. 259 (1970); Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner*, 4 Loyola L.A. L. Rev. 438 (1971); Note, *Public Access to Beaches*, 22 Stan. L. Rev. 564 (1970); Note, 59 Cal. L. Rev. 231 (1971)).

public can be made, not by failing to prevent the general public from acting in some ill-defined manner, but only expressly through a writing or as provided otherwise by statute. *Id.* § 1009(b)-(c). That is, dedications once again require the clear and unequivocal intent of the owner.

The statute goes further than merely overturning *Gion-Dietz*'s extensions of implied-in-law doctrine; it corrects the fundamental error perpetuated throughout the doctrine's case law: the acceptance of a 'legal fiction' in lieu of the owner's actual intent. *See Berk*, 26 Cal. 3d at 231 (Clark, J., dissenting) ("Not only has the Legislature rejected the *Gion-Dietz* assumptions but it has also rejected our proclamation that public use alone without regard to landowner conduct is sufficient to warrant a finding of prescriptive dedication.").

Implied-in-law dedication has met a similar fate in other jurisdictions. For example, the Supreme Court of Idaho rejected an invitation to follow *Gion-Dietz* in *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1100 (Idaho 1979). That court stated: "[i]t is no trivial thing to take another's land without compensation, and for this reason the courts will not lightly declare a dedication to public use." *Id.* at 1099. Although a long period of public use "is some evidence of a right in the public," it is also "entirely consistent with a license to the public." *Id.* at 1100. Consequently, "a party claiming a right by dedication bears the burden of proof on every material issue" and thus "[t]he intent of the owner to dedicate his land to public use must be clearly and

unequivocally shown and must never be presumed." *Id.* Idaho was not alone in this view, citing decisions from nine other states already conflicting with California's then-extreme position.[7] Even states like Hawaii, which allows for a presumption of implied dedication, at least concede that the presumption may

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[7] *Id.* (citing *Hamerly v. Denton*, 359 P.2d 121, 125 (Alaska 1961) ("Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character." (footnote omitted)); *City of Scottsdale v. Mocho*, 444 P.2d 437, 441 (Ariz. Ct. App. 1968) ("Dedications being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing, and the acts proved must not be consistent with any construction other than that of a dedication." (citation omitted)); *Dep't of Natural Resources v. Mayor and Council of Ocean City*, 332 A.2d 630, 635 (Md. 1975) ("Implying a dedication solely through long public use without regard to any intent to dedicate on the part of the landowner is but a form of prescription . . . ."); *Laug v. Ottowa County Road Comm'n*, 195 N.W.2d 336, 338 (Mich. Ct. App. 1972) ("[N]o presumption of an intent to dedicate arises, unless it is clearly and expressly shown by his acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended." (citation omitted)); *Miller v. Roy W. Heinrich & Co.*, 476 P.2d 183, 184 (Or. 1970) ("To constitute a valid dedication the burden of proof is upon the party asserting the dedication to establish an intent, clearly and unequivocally manifested, on the part of the owner to devote the property to public use."); *Shia v. Pendergrass*, 72 S.E.2d 699, 702 (S.C. 1952) ("The fact that the public was allowed to use the strip of land . . . without objection by the owner, is not sufficient from which to imply a dedication."); *Bonner v. Sudbury*, 417 P.2d 646, 648 (Utah 1966) ("The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way . . . ."); *Cummins v. King County*, 434 P.2d 588, 590 (Wash. 1967) ("In determining the intention of the dedicator, '[a]n intention to dedicate will not be presumed, and a clear intention must appear.'" (citation omitted)); *Carr v. Hopkin*, 556 P.2d 221, 224 (Wyo. 1976) ("There must be intent of the owner to devote the property to a public use, which must be clearly and unequivocally sho[w]n and must never be presumed . . . .")).

be rebutted by evidence showing no intent to donate. *Application of Banning*, 832 P.2d 724, 729-30 (Haw. 1992).

Despite the doctrine's rejection in other states, the academy, and the Legislature, California courts have found reason to revive it, despite the unambiguous terms of Section 1009. *See Hanshaw*, 116 Cal. App. 4th at 474 (holding Section 1009 inapplicable to non-recreational land); *Bustillos*, 96 Cal. App. 4th at 1280-81 (reading Section 1009 to apply only to recreational use); *Pulido*, 234 Cal. App. 4th at 1250 (inserting language from Section 1009's preamble into its operative subsection to limit its application to recreational use). These decisions push textual construction beyond its limit by restricting Section 1009's broad language to the relatively narrow field of recreational use. Just like the repudiated dedication doctrine they seek to revise, these cases are bad law and further bad policy.

Accepting Plaintiffs' plea to follow the faulty reasoning of these cases will put California landowners back where they were before Section 1009 was passed—guessing which permissive uses of their land may eventually strip them of their property rights without compensation. Only a properly broad reading of the text prevents this and provides landowners enough security in their property rights to share access to and over their land with their fellow Californians.

To the extent this Court judicially narrows the broadly prohibitive language of Section 1009, it not only reintroduces the uncertainty that will force landowners to build gates and fences around their properties, but it will also be endorsing unconstitutional takings of private property without compensation. The hardest hit will be those generous and open-handed landowners who, though not intending a permanent dedication, decline to erect fences and walls to close out the public.

CONCLUSION

For the foregoing reasons, Amici urge the Court to affirm the ruling below.

DATED: July 13, 2016.

Respectfully submitted,

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By
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE BURKE DEFENDANTS AND AFFIRMANCE is proportionately spaced, has a typeface of 13 points or more, and contains 4,677 words.

DATED: July 13, 2016.

JULIO N. COLOMBA

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On July 13, 2016, true copies of APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE BURKE DEFENDANTS AND AFFIRMANCE were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13th day of July, 2016, at Sacramento, California.

TAWNDA ELLING