No.

In the Supreme Court of the United States

MARINER'S COVE TOWNHOMES ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY W. KINNEY
MICHAEL L. DESHAZO
JOHN D. MIRANDA
Kinney, Ellinghausen, Richard & DeShazo
1250 Poydras Street, Suite 2450
New Orleans, Louisiana 70113
(504) 524-0206

DANIEL R. ORTIZ*
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
dro@virginia.edu
(434) 924-3127

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street
8th Floor
New York, NY 10013
(212) 334-8813

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania
Ave., NW., Suite 600
Washington, DC 20004
(202) 639-6500

QUESTION PRESENTED

The Fifth Amendment to the United States Constitution provides that no private property shall be taken for public use without just compensation. U.S. Const. amend. V. In the present case, the United States condemned 14 of 58 properties comprising Mariner's Cove Townhomes Association, Inc. All 58 properties were bound by a covenant running with the land to contribute assessment fees to support activities of the association. The Fifth Circuit recognized that the association's right to collect assessments was a property right under controlling state law but nevertheless held that the government need not pay any compensation for taking it. The question presented is:

Whether, as the Seventh, Ninth, and Tenth Circuits and numerous state supreme courts have held, "the right to collect assessments, or real covenants generally," App., *infra,* 18a, constitute *compensable* property under the Takings Clause or whether, as the Fifth and D.C. Circuits and a smaller group of state supreme courts have held, they constitute *noncompensable* property.

RULE 29.6 STATEMENT

Mariner's Cove Townhomes Association, Inc., does not have a parent corporation, and no publicly held company owns 10 % or more of the company's stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 705 F.3d 540. The order of the district court (App., *infra*, 28a-41a) is available at 2011 WL 5419725.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2013. Petitioners timely filed a petition for panel rehearing and rehearing en banc, which was denied on March 26, 2013. App., *infra*, 42a-46a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation."

STATEMENT

A. Introduction

The Takings Clause of the Fifth Amendment serves as a bulwark "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). "Though the meaning of 'property' * * * in

the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *United States* v. *Powelson*, 319 U.S. 266, 279 (1943).

The decision below implicates a recognized conflict concerning whether the Takings Clause requires the government, when exercising its power of eminent domain, to compensate private parties for the lost value of real covenants associated with the condemned land. Most jurisdictions hold that real covenants, defined as covenants that are "intimately and inherently involved with the land and therefore binding [upon] subsequent owners," App., *infra*, 16a n.4 (citing *Black's Law Dictionary* 421 (9th ed. 2009), create compensable property interests for purposes of the Takings Clause, *Adaman Mut. Water Co.* v. *United States*, 278 F.2d 842, 849 (9th Cir. 1960), see pp. 12-18, *infra*. In contrast, the court of appeals below joined a minority of jurisdictions in holding that rights created by such covenants, though considered real property under applicable state law, are nevertheless not compensable under the Takings Clause. See generally App., *infra*, 13a-27a, pp. 10-12, *infra*.

The decision below conflicts with bedrock principles of takings law. The government is obligated to provide just compensation any time "the interest for which compensation is sought is a property interest or right, and that interest has actually been taken." App., *infra*, 12a-13a. The court of appeals below determined that petitioner's covenant was unquestionably real property under Louisiana law, *id.* at 13a-16a, but nevertheless held that real covenants are not compensable because of "public policy concerns," *id.* at 20a; see generally *id.*

at 16a-23a. That holding subverts the Fifth Amendment's fundamental promise that private property not be taken without just compensation and threatens the stability of all real covenants, which are critical to structuring commercial and residential developments and conservation districts. This Court's review is warranted.

B. The Taking

This case arises out of the exercise of eminent domain against 14 of the 58 townhouses in Mariner's Cove, a residential development located near Lake Pontchartrain in Louisiana. App., *infra*, 28a-29a. After Hurricane Katrina destroyed a levee adjacent to the development, the United States Army Corps of Engineers sought to acquire these properties to facilitate access to the construction site for an improved pumping station. App., *infra,* 6a. Before condemnation, these 14 townhouses were subject to a variety of covenants, servitudes, and other obligations enumerated in the "Declaration of Servitudes, Conditions and Restrictions of Mariner's Cove Townhomes Association, Inc." App., *infra*, 5a. One such covenant granted Mariner's Cove Townhomes Association ("MCTA") the right to levy periodic assessments on the townhouses in the Mariner's Cove development to cover various expenses associated with the "maintenance, repair, replacement, administration and operation" of the development. App., *infra*, 52a. The owner of each townhouse was required to pay "a proportionate 1/58 share" of these expenses, *ibid.*, which resulted from, *inter alia*, "maintenance of all streets and pedestrian walkways within the project, lawn maintenance and landscaping, [and] maintenance of water and sewer

service," *id.* at 47a-48a, as well as maintenance of various insurance policies, *id.* at 57a-58a. In the event of nonpayment, MCTA could enforce a lien against the delinquent owner's property. *Id*. at 55a.

C. The District Court Proceedings

In June 2009, the government filed condemnation actions against 14 of these townhouses in the Eastern District of Louisiana, naming MCTA as an owner. App., *infra*, 6a. In response, MCTA filed an Answer and Declaration of Interest seeking just compensation under the Takings Clause of the Fifth Amendment for the loss of its right to collect assessments on these properties. *Id.* at 29a. The United States then moved for judgment on the pleadings, contending that MCTA's right to collect assessments, though property under Louisiana law, was not compensable under the Takings Clause. Mot. J. Pleadings at 14.

The district court granted the government's motion. App., *infra*, 41a. The court rested its analysis almost completely on distinguishing one of MCTA's principal authorities, *Adaman Mut. Water Co.* v. *United States*, 278 F.2d 842 (9th Cir. 1960), which held that the Takings Clause entitled a water company to compensation for the diminution of its assessment base. App., *infra*, 36a-40a. The court recognized that "[l]ike the water company in *Adaman*, MCTA is a non-profit business that collect[s] assessments from landowners in exchange for services pursuant to an agreement that state[s] that it r[u]n[s] with the land." *Id.* at 38a. Although MCTA's assessments were used to maintain the roads that gave residents access to the development and to maintain their water supply, *id*. at 36a-37a,

and were enforceable by liens on the subject properties, *id*. at 55a, the district court held that MCTA's assessment rights were not compensable under the Taking Clause. Unlike the assessment rights in *Adaman*, it held, MCTA's rights were not "directly connected with the physical substance of the land." *Id*. at 40a.

D. The Court of Appeals Decision

The court of appeals affirmed, holding that MCTA's rights under the real covenant, although unquestionably property under state law, were not compensable under the Takings Clause. App., *infra*, 13a-27a. In doing so, the court acknowledged that it was adopting the minority position in an "interjurisdictional conflict," recognized by "[v]arious texts," *id.* at 19a (citing 2 Nichols On Eminent Domain § 5.07[4][b], p. 5-366-72 (3d ed. 2012)), and noted that "decisions in other [jurisdictions] addressing this question are legion and conflicting," *ibid.*

The Fifth Circuit recognized that under Takings Clause principles, "the government is required to provide just compensation if the interest for which compensation is sought is a property interest or right, and that interest has actually been taken." App., *infra*, 12a-13a. The Fifth Circuit acknowledged that MCTA's assessment right was property under Louisiana law and observed that neither the district court nor the government disagreed. *Id.* at 13a, 16a. It also did not dispute that MCTA's interest had "actually been taken." *Id.* at 13a. The Fifth Circuit nonetheless held that MCTA's covenantal right was not compensable. *Id.* at 16a.

The court reasoned that providing compensation for the taking of real covenant rights implicated several "public policy concerns." App., *infra*, 20a. First, the court wrote that requiring compensation for the taking of "private covenants might unduly burden the government's ability to exercise its power of eminent domain," *id.* at 21a, especially when the covenants "do not stem from the physical substance of the land," *id.* at 22a. The court also concluded that "real covenants are akin to contracts; that no contract of private persons can make acts done in the proper exercise of government powers, and not directly encroaching upon private property, a taking; and that 'contracts purporting to do this are void, as against public policy.'" *Id.* at 21a (quoting *United States* v. *Certain Lands,* 112 F. 622 (C.C.D.R.I. 1899)).[1]

The court also stated that, in its view, MCTA's covenant was "functionally contractual" because "[b]ut for its inclusion in the Declarations, the * * * covenant * * * would amount to nothing more than a service contract." *Id.* at 22a.

The court concluded that because of the "contractual" nature of MCTA's covenant, compensation was barred by the "consequential loss rule." App., *infra,* 27a. The court acknowledged that this body of law distinguishes between "compensable losses of property" and "noncompensable losses of interests *other than* property," *id.* at 17a (emphasis

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[1] The court also noted the argument that "since the state has the power to condemn the fee before the imposition of a restrictive covenant, the placing of the additional burden on the land does not create a new compensable interest." App., *infra*, 20a n.8. However, the court did not expressly adopt this argument.

added), and recognized that the authorities the government relied on "d[id] not concern losses of property" but rather "business losses and frustration of contracts." *Id.* at 18a. "Nevertheless," the court concluded, "the consequential loss rule applies because MCTA's right to collect assessments is a real covenant that functions like a contract and * * * is not 'directly connected with the physical substance of the land.'" *Ibid.* (quoting *Adaman,* 278 F.2d at 845).

The Fifth Circuit maintained that its holding did not conflict with the Ninth Circuit's decision in *Adaman*, which likewise involved the compensability of a non-profit corporation's assessment rights on condemned property. The assessments in *Adaman* were paid by farm owners in exchange for the extraction and distribution of water from beneath their land. 278 F.2d at 844. As in the current case, those assessment rights were created by real covenants that ran with the land. *Id*. at 843-844. The Ninth Circuit in *Adaman* awarded compensation and explained that "any right or duty, benefit or burden, which moves or is transferred as one with * * * the land * * * must be deemed an interest in that land and compensable upon condemnation of the fee" because these rights and duties established a "direct connection with the land." *Id.* at 849.

The Fifth Circuit held that MCTA's case "differ[ed] from *Adaman* in two important respects." App., *infra*, 25a-26a. First, unlike MCTA's assessments, the water company's "not only were used to provide a service * * * but also enabled the landowners in the agricultural project to exercise the rights to the water underlying the project lands." *Id.* at 26a. "This direct connection between water rights

and the right to collect assessments differentiates *Adaman* from the instant case," the court held, "because [MCTA'a] assessments do not allow the landowners in Mariner's Cove to enjoy a tangible right arising from the land." *Ibid.* Second, the court concluded that MCTA's assessments lacked this "direct connection" for another, related reason. They were not charged "in exchange for a natural resource that was directly connected to the physical substance of the land." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

There is a deep, acknowledged conflict among the federal courts of appeals and state supreme courts over "whether the right to collect assessments, or real covenants generally, are compensable under the Takings Clause." App., *infra*, 18a. The issue has important implications for the hundreds of thousands of association-governed communities that collect $40 billion in assessment fees each year, Cmty. Ass'ns Inst., Industry Data, http://www.caionline.org/info/research/Pages/default.aspx (last visited June 6, 2013), to fund common services and amenities, including private roads, street lights, utilities, swimming pools, landscaping, security, and schools. In 2012, such associations governed 25.9 million American housing units in which 63.4 million people lived. *Ibid.* Whether such associations must be compensated under federal law for lost assessment fees when some of their individual properties are condemned now depends on the happenstance of geography. Since the conflict is deep and growing, this Court should not delay review.

I. There Is A Deep, Acknowledged, And Growing Conflict Among The Courts Of Appeals And State Supreme Courts Over Whether The Right To Collect Assessment Fees And Covenantal Rights More Generally Are Compensable Under The Fifth Amendment

In reaching its decision below, the Fifth Circuit recognized that an "interjurisdictional conflict," App., *infra*, 19a, exists over "whether the right to collect assessments, or real covenants generally, are compensable under the [federal] Takings Clause," *id.* at 18a. Answers to this "question," it noted, "are legion and conflicting." *Id.* at 19a. Both the leading treatise on eminent domain and the Restatement acknowledge the conflict. 2 Nichols On Eminent Domain § 5.07[4][a]-[b] (collecting cases and discussing the "majority" and "minority" views in the "dispute whether a person in whose favor such a restriction exists has a compensable interest in a condemnation proceeding"); Restatement (Third) of Property: Servitudes § 7.8, reporter's note (2000) (same). Indeed, the law is so unsettled that the United States itself takes both positions, demanding compensation when it loses the right to collect assessment fees under real covenants taken by state and local governments, see, *e.g.*, *California* v. *25.09 Acres of Land*, 329 F. Supp. 230, 232 (S.D. Cal. 1971), and, as here, refusing to pay compensation for such lost fees when it takes property subject to real covenants from private parties, App, *infra*, 6a-7a. Because "[t]he federal rule is uncertain," *Adaman*, 278 F.2d at 847, and "state decisions * * * are numerous [and] in hopeless conflict," *id.* at 849, only this Court's review can bring uniformity to the law

and settle this pressing and practically important issue.

A. Two Federal Circuits And Five State Supreme Courts Have Expressly Or Implicitly Held That The Right To Collect Assessment Fees Or Covenantal Rights More Generally Do Not Constitute Compensable Property Interests Under The Fifth Amendment's Takings Clause

The Fifth and D.C. Circuits have held that "the right to collect assessments, or real covenants generally, are [not] compensable under the [federal] Takings Clause." App., *infra*, 18a; see *Moses* v. *Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934) ("[A]s against the sovereign in discharge of a governmental function, [covenants] are not enforceable to restrict or burden the exercise of eminent domain."). In addition, Alabama has held that such interests are not compensable, *Burma Hills Dev. Co.* v. *Marr*, 229 So. 2d 776, 782 (Ala. 1969), without specifying whether its ruling rests on the federal or state takings clause. Since its supreme court has held that the federal and state provisions are coextensive, however, see *Rudder* v. *Limestone Cnty.*, 125 So. 670, 672 (Ala. 1929), its holding reaches the Fifth Amendment. Arkansas, Colorado, Georgia, and West Virginia have also held that such property interests are not compensable, see *Ark. State Highway Comm'n* v. *McNeill*, 381 S.W.2d 425, 427 (Ark. 1964); *Smith* v. *Clifton Sanitation Dist.*, 300 P.2d 548, 550 (Colo. 1956); *Anderson* v. *Lynch*, 3 S.E.2d 85, 89 (Ga. 1939), *State* v. *City of Dunbar*, 95 S.E.2d 457, 461 (W. Va. 1956), without making clear whether their rulings rest on federal or state takings law. Since it is

inconceivable that any state supreme court would fashion a state takings rule that violated that court's understanding of the federal constitution, these holdings must be presumed to rest implicitly on what federal law requires. As one state supreme court expressed the rule, if a state's constitutional protection "is more restrictive (less protective) * * * than the interpretation of that right by the United States Supreme Court, which, of course, is deemed the minimum permissible, then this court is *constitutionally obligated* to apply the * * * more protective[] federal interpretation." *Dworkin* v. *L.F.P., Inc.*, 839 P.2d 903, 913 (Wyo. 1992) (emphasis added).

As one state supreme court taking this minority approach candidly admitted, these courts "have had some difficulty in finding a sound basis for refusing an award" but have usually held covenantal rights noncompensable for one of two reasons. *Ark. State Highway Comm'n*, 381 S.W.2d at 426-427. First, some jurisdictions have held that *for takings purposes* covenantal rights are not property at all, but rather contract rights that require no compensation in eminent domain. See, *e.g.*, App., *infra*, 22a ("[I]f we were to recognize MCTA's right as compensable, we would give special status under the Takings Clause to what essentially is a contract."); *Moses*, 69 F.2d at 844; *Burma Hills Dev. Co.*, 229 So. 2d at 781-782; *Anderson*, 3 S.E.2d at 87. These jurisdictions admit, however, that for purposes other than takings law covenants constitute property interests enforceable between private parties. See App., *infra*, 16a; *Burma Hills Dev. Co.*, 229 So. 2d at 778; *Moses*, 69 F.2d at 844; *Anderson*, 3 S.E.2d at 89.

Second, some jurisdictions have held that requiring compensation would unduly burden the State's use of eminent domain. See, *e.g.*, App., *infra*, 22a; *Moses*, 69 F.2d at 844; *Anderson*, 3 S.E.2d at 89; *City of Dunbar*, 95 S.E.2d at 461.

Finally, one jurisdiction has held that while covenants undoubtedly protect property rights, taking such a right is not compensable because the damage results from the government's undesirable use of the land and not the loss of the right itself. *Ark. State Highway Comm'n*, 381 S.W.2d at 427. In this view, the taking of covenantal rights does not itself cause any injury.

B. Three Federal Circuits And Seventeen State Supreme Courts Have Held Expressly Or Implicitly That The Right To Collect Assessment Fees Under A Real Covenant Or Covenantal Rights More Generally Represent Compensable Property Interests Under The Fifth Amendment's Takings Clause

The Ninth, Seventh, and Tenth Circuits have held that covenants imposing duties that run with condemned land create compensable property interests under the Fifth Amendment's Takings Clause. In *United States* v. *129.4 Acres of Land*, 572 F.2d 1385 (9th Cir. 1978), for example, the Ninth Circuit adopted in full a district court opinion that had held compensation necessary whenever "a diminution of an entity's assessment base [is] caused by condemnation of property by the Government," provided that the remaining landowners "would be bound to pay increased assessments" and that "the obligations and benefits flowing from the operation of

the [covenant] are appurtenant to the land [taken]," *United States* v. *129.4 Acres of Land,* 446 F. Supp. 1, 5 (D. Ariz. 1976). In *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 459 (7th Cir. 2002), the Seventh Circuit joined the Ninth Circuit in adopting this position, holding that because the owners had lost the right to enforce the covenant, "they have demonstrated a property right that has been taken by state action." It noted that a "covenant constitutes a constitutionally protected property interest" because it "runs with the land and 'creates a property right in each grantee and subsequent grantee of a lot in the plat.'" *Ibid.* (quoting *Pulos* v. *James*, 302 N.E.2d 768, 771 (Ind. 1973)). Likewise, the Tenth Circuit has held that, so long as there is "a nexus between the alleged interest and the property actually taken," the government must pay compensation. *United States* v. *677.50 Acres of Land*, 420 F.2d 1136, 1140 (10th Cir. 1970). In discussing the original Ninth Circuit case, *Adaman*, 278 F.2d 842, upon which it relied, the Tenth Circuit expressly recognized that "this indispensable link," 420 F.2d at 1140, was present when the government took the right to collect assessment fees because a "covenant imposing a duty which runs with the land * * * constitutes a compensable interest in that land," *id.* at 1139 (quoting *Adaman*, 278 F.2d at 849).

In addition to these three circuits, three state supreme courts have held that covenants create compensable property interests under the federal Takings Clause. See *Pulos*, 302 N.E.2d at 774 ("The[] right to [enforce a covenant] is a property right and may not be taken * * * without just compensation. Thus, * * * we * * * run afoul of * * * the due process clause of the Fourteenth Amendment."); *Peters* v.

Buckner, 232 S.W. 1024, 1027 (Mo. 1921) (holding that "rights [granted by real covenants] are property rights, and under the * * * Fifth Amendment * * * such property cannot be taken or damaged without just compensation"); *Meredith* v. *Washoe Cnty. Sch. Dist.*, 435 P.2d 750, 752 (Nev. 1968) (holding that under both the Fifth Amendment and Nevada constitution a "covenant [is] an interest in property, or a property right accorded legal recognition and protection in all cases, and therefore, must be justly compensated for its taking or extinguishment").

Six other state supreme courts take this position under their state Takings Clauses, which they have held are coextensive with the federal Takings Clause. High courts in Florida, see *Palm Beach Cnty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379, 380 (Fla. 1999) (holding that "a covenant running with the land and requiring individual lot owners * * * to pay monthly recreation fees * * * constitutes a compensable property right"), Maryland, see *Mercantile-Safe Deposit & Trust Co.* v. *Mayor of Baltimore*, 521 A.2d 734, 741 (Md. 1987) (holding "that a covenant running with the land ordinarily is a compensable property interest in the condemnation context"), Massachusetts, see *Ladd* v. *City of Boston*, 24 N.E. 858, 859 (Mass. 1890) (similar), Michigan, see *Allen* v. *City of Detroit*, 133 N.W. 317, 320 (Mich. 1911) (similar), Nebraska, see *Horst* v. *Hous. Auth.*, 166 N.W.2d 119, 121 (Neb. 1969) (similar), and South Carolina, see *Sch. Dist. No. 3* v. *Country Club of Charleston*, 127 S.E.2d 625, 627 (S.C. 1962) (similar), have all held that the right to collect assessments or real covenants generally are compensable under their state takings clauses. These States have interpreted their state takings clauses in this respect

coextensively with the Fifth Amendment. See *St. Johns River Water Mgmt. Dist.* v. *Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011); *Mercantile-Safe Deposit & Trust Co.*, 521 A.2d at 740 n.3; *Commonwealth* v. *Blair*, 805 N.E.2d 1011, 1016-1017 (Mass. App. Ct. 2004); *Ypsilanti*, *Fire Marshal* v. *Kircher*, 730 N.W.2d 481, 516 n.22 (Mich. Ct. App. 2007); *Strom* v. *City of Oakland*, 583 N.W.2d 311, 316 (Neb. 1998); *Byrd* v. *City of Hartsville*, 620 S.E.2d 76, 79 n.6 (S.C. 2005).

In addition, eight other state supreme courts have adopted this position in implicit reliance on the Fifth Amendment. See *Town of Stamford* v. *Vuono*, 143 A. 245, 249 (Conn. 1928) ("When, therefore, property subject to a restrictive easement [in the form of a covenant] is taken for a public use, it has been held that the owner of the property for whose benefit the restriction is imposed is entitled to compensation."); *Ashland-Boyd Cnty. City-Cnty. Health Dept.* v. *Riggs*, 252 S.W.2d 922, 924-925 (Ky. 1952) (same); *Flynn* v. *New York, W. & B. Ry. Co.*, 112 N.E. 913, 914 (N.Y. 1916) (same); *City of Raleigh* v. *Edwards*, 71 S.E.2d 396, 402 (N.C. 1952) (same); *Hughes* v. *City of Cincinnati*, 195 N.E.2d 552, 555-556 (Ohio 1964) (same); *City of Shelbyville* v. *Kilpatrick*, 322 S.W.2d 203, 205 (Tenn. 1959) (same); *Meagher* v. *Appalachian Elec. Power Co.*, 77 S.E.2d 461, 465-466 (Va. 1953) (same); *State* v. *Human Relations Research Found.*, 391 P.2d 513, 516 (Wash. 1964) (same).

Although these courts did not make clear the extent to which their decisions rested on federal constitutional commands, their holdings implicate the Fifth Amendment. In cases involving the interpretation of both the federal Takings Clause and a substantially similar state counterpart, this Court

has assumed that state constitutional analysis mirrors the federal. See *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 236-237 (1984) (holding that Hawaii takings provision presented "no uncertain question of state law," even though it was theoretically possible that the state's courts would interpret the clause differently from the federal constitution); see also Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409, 1427 (1999) (noting this Court's presumption that parallel "state constitutional provisions merely follow federal doctrine"). All these holdings depend at least in part, moreover, on understandings of what the federal Takings Clause requires. All either rest directly on federal law or at the least were decided in the shadow of what federal law requires. As the leading commentator has noted, "[a] United States Supreme Court decision on the [federal] issue [w]ould be decisive [in ending the conflict.]" See William B. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L. Rev. 293, 303 (1970).

Courts following the majority view have set forth several reasons for holding that covenantal rights are compensable. Many courts explain that because covenantal rights are a form of ordinary property the government must compensate those from whom they are taken. See, *e.g.*, *Johnstone* v. *Detroit, G.H. & M. Ry. Co.*, 222 N.W. 325, 329 (Mich. 1928); *Meredith,* 435 P.2d at 752; *Kilpatrick*, 322 S.W.2d at 205-206.

Many of these courts also reason that extinguishing covenantal rights imposes direct injuries on the covenant holder as opposed to noncompensable consequential losses, see *United*

States v. *Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (holding consequential losses not compensable). Whenever a covenant "runs with the land," these courts hold, "a direct connection with the physical substance condemned is established, and the pitfalls of the consequential loss doctrine are avoided." *Adaman*, 278 F.2d at 846, 849; see also *Flynn*, 112 N.E. at 914 ("These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and noncompensational.").

Many of these courts also specifically address and reject the argument that compensation for covenantal rights unduly burdens the government's power of eminent domain and undermines the state's police power. See, *e.g.*, *Vuono*, 143 A. at 249; *Meredith*, 435 P.2d at 752-753 ("We cannot see how compensation, required by constitutional commands, can be said to interfere with any governmental taking."); *Kilpatrick*, 322 S.W.2d at 205; *Meagher*, 77 S.E.2d at 465-466. Unlike a private party, the government may violate or extinguish a covenant through eminent domain, provided it "merely pay[s] for it." *Cove Club Investors Ltd.*, 734 So. 2d at 387 (citing William B. Stoebuck, Nontrespassory Takings in Eminent Domain 134 (1977)). After all, these courts note, eminent domain is already a "complicated and expensive * * * last resort when other efforts to secure needed private property for public use [have] fail[ed]," and even where covenants benefit numerous parties in a subdivision little additional difficulty would result. *Allen*, 133 N.W. at 321; see also *Leigh* v. *Vill. of Los Lunas*, 108 P.3d 525, 530-531 (N.M. Ct. App. 2004). Still other courts argue that providing compensation for covenantal rights will not substantially burden

the government's use of eminent domain because the injuries will be small and must be proved by every holder of the covenant asserting a loss. See *Meredith,* 435 P.2d at 752-753.

Finally, many courts reason that covenantal rights should be compensable because they are in no relevant way different from traditional easements, which all jurisdictions agree are compensable. As the Ninth Circuit explained, "[b]oth [covenants and easements] are directly connected to the land and we are unable to find a distinction between them which will justify dissimilar treatment at the hands of a condemning authority." *Adaman*, 278 F.2d at 849; see also *Vuono*, 143 A. at 249; *Edwards*, 71 S.E.2d at 402; *Leigh*, 108 P.3d at 530-531.

* * *

Whether the right to collect assessment fees or covenantal rights more generally are compensable depends largely on geography. The result can also turn, however, on which level of government is taking the property. When the federal government takes property in Colorado, for example, it must pay compensation for such rights, see *677.50 Acres of Land*, 420 F.2d at 1140, but when the state government takes the same property it need not, see *Clifton Sanitation Dist.*, 300 P.2d at 550. As the Fifth Circuit acknowledged, the decisions addressing the compensability of covenantal rights are "legion and conflicting." App., *infra*, 19a. And by breaking with the Seventh, Ninth, and Tenth Circuits and joining the minority of jurisdictions that hold that covenantal rights are not compensable, the Fifth Circuit's decision has deepened this pervasive uncertainty. This Court's review is necessary to

resolve this stark, entrenched, and well-recognized conflict.

II. The Fifth Circuit's Arbitrary and Restrictive Rule Is Wrong

The Fifth Circuit recognized that petitioner's right to collect assessments on the condemned lots constituted "a property interest" under state law. App., *infra*, 16a. Following the minority rule, however, it held that takings of such interests require no compensation because the covenants are "akin to contracts" and requiring compensation would place "undue burdens" on the government's exercise of eminent domain. *Id.* at 21a. That conclusion violates the plain terms of the Takings Clause and this Court's precedents.

The Fifth Amendment admits of no category of noncompensable property. This Court has long held, consistent with the Fifth Amendment's unqualified terms, that when the government exercises its power of eminent domain it must "pay just compensation for *any* property taken." *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (emphasis added). The obligation to pay just compensation extends to property interests that fall far short of full ownership, see, *e.g.*, *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 194-195 (1910) (holding government must pay just compensation for taking an easement), even to intrusions "no matter how minute," see *Lucas* v. *S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984); *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 76 (1982). And the government must pay just compensation even when it itself

derives no benefit from the particular property right taken. It is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *Gen. Motors Corp.*, 323 U.S. at 378.

Like other jurisdictions adopting the minority position, the Fifth Circuit evinced "some difficulty in finding a sound basis for refusing an award." *Ark. State Highway Comm'n*, 381 S.W.2d at 426-427. Its principal ground was that "MCTA's right to collect assessments is a real covenant that *functions like a contract* and * * * is not directly connected with the physical substance of the [land.]" App., *infra*, 18a (emphasis added). Taking such a right, it held, amounted to no more than imposing a "consequential loss" for which no just compensation was necessary. *Ibid.* That logic is exceedingly strange.

First, as the decision below recognized, the consequential loss rule does not create a category of noncompensable property. It instead draws a line between "compensable losses of property * * * [and] noncompensable losses of *interests other than property*." *Id.* at 17a (emphasis added). As this Court has held, consequential losses, which include "future loss of profits[and] the expense of moving removable fixtures and personal property from the premises," *Gen. Motors Corp.*, 323 U.S. at 379, do not require just compensation under the Fifth Amendment because they are not property, *id.* at 379-382. The consequential loss rule does not purport to identify some subset of *property interests* that are not compensable. Indeed, the Fifth Circuit itself recognized as much. When the government attempted to proffer some case law in support of its

proposed rule, the Fifth Circuit recognized the cases as inapposite because they "d[id] not concern losses of property [but] business losses and frustration of contracts." *Id.* 18a.

Second, although real covenants have some features of contract, they are no less property for that. This Court has long recognized that forms of property "akin to contracts," App., *infra*, 21a, are compensable. Although it is blackletter law that leases may be characterized either as contracts or interests in land, see, *e.g.,* Alvin L. Arnold & Jeanne O'Neill, Real Estate Leasing Practice Manual § 31.1 (2013), for example, this Court has repeatedly held that leaseholds are property compensable under the Takings Clause, see, *e.g.*, *Gen. Motors Corp.*, 323 U.S. at 382, and courts generally hold covenants to the real property version, not the standard contracts version, of the Statute of Frauds, Stoebuck, 56 Iowa. L. Rev. at 305.

The particular covenant here, moreover, has much less in common with "service contract[s]," App., *infra*, 22a, than the Fifth Circuit casually assumed. Although certain of petitioner's expenses may have decreased as the development decreased in size, others are inelastic and must be incurred whether there are 44 or 58 properties. (Indeed, under the rule below, even the government's seizure of *44* properties in a 58-unit development, which would surely deal an even more crippling blow to the project's assessment base, would not trigger compensation).[2]

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[2] Even if the court below had determined, rather than assumed, that petitioner's expenses declined in precise proportion to the number of properties condemned, that

Third, MCTA's right to collect assessments, like real covenants generally, "is * * * directly connected with the physical substance of the [land.]" App., *infra*, 18a. Real covenants, unlike contracts, which impose only personal obligations, see, *e.g.*, *Runyon* v. *Paley*, 416 S.E.2d 177, 182-183 (N.C. 1992), run with the land, "binding subsequent owners and successor grantees indefinitely," App., *infra*, 15a (citing *Black's Law Dictionary* 421 (9th ed. 2009)). Moreover, if a townhouse owner does not pay the assessments required under the covenant, MCTA can obtain a lien on the property itself, see *id.* at 55a; Restatement (Third) of Property: Servitudes § 8.3 (2000), reflecting the covenant's "connect[ion] with the physical substance of the [land,]" App., *infra*, 18a. Indeed, as the Fifth Circuit itself recognized, the only reason why a real covenant can bind subsequent owners is that it is "*intimately and inherently involved with the land*." App., *infra*, 16a n.4 (emphasis added).

The Fifth Circuit followed several other minority jurisdictions in offering an additional reason why taking covenantal rights should not require compensation. It argued that requiring compensation for this type of property right would "unduly burden the government's ability to exercise its power of eminent domain." App., *infra*, 21a. But this rationale suffers from many legal and logical defects. For starters, the Fifth Amendment's text provides no such limitation. It offers no authority for denying compensation to those whose property is taken in order to allow the government to take more property

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would bear not on compensability, but rather on the *amount* of compensation due. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 237 (2003).

more easily. It requires "*just* compensation," not whatever amount best facilitates eminent domain—an amount that would necessarily always and everywhere be zero.

As a leading commentator has explained, moreover, if (counterfactually) the constitutional obligation to provide "just compensation" *did* contemplate some sort of balancing between individual fairness and protection of the public fisc, there would be no reason to limit that "principle" to this particular subset of property interests. Stoebuck, 56 Iowa L. Rev. at 307. And, if that principle were applied "consistently[,] then the constitutional guarantees of compensation would be destroyed in every case." *Ibid.*

Indeed, the assumption that courts should construe the Takings Clause to make condemnations as inexpensive as possible rests on a basic error. Although the eminent domain *power* exists to ensure that the government's "perform[ance of] its functions" is not "defeated" by the opportunism or parochial interests of private property owners, *Kohl* v. *United States*, 91 U.S. 367, 373 (1875), the Fifth Amendment's *protection* exists to ensure that owners do not "bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong*, 364 U.S. at 49, "no matter how weighty the public purpose," *Lucas*, 505 U.S. at 1015. Just as in other settings, requiring just compensation does not aim to "limit the governmental interference with property rights *per se,* but rather * * * secure[s] *compensation* in the event of otherwise proper interference." *First English Evangelical Lutheran*

Church of Glendale v. *Los Angeles Cnty.,* 482 U.S. 304, 315 (1987).

The Fifth Circuit's underlying premise—that applying the Takings Clause to the right to collect assessments in the same way it applies to similar interests like easements would add to the government's "burden"—is unsound. More than a century ago, this Court recognized that just compensation is necessarily *reduced* when the property condemned is encumbered by easements or other servitudes. See, *e.g.*, *Boston Chamber of Commerce*, 217 U.S. at 195 (stating that the Constitution "does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole"). As in that case, *some* of "what [was] lost," *ibid.*, by condemnation here belonged to the townhouse owners—the value of property, *as burdened by the perpetual assessment obligation*—but some belonged to petitioners by operation of the covenants. Thus, the minority rule does not spare the government an inequitable "burden" so much as provide a windfall—relieving the government of the obligation to take full account of and responsibility for the private burdens, as well as the public benefits, of compulsory land acquisitions.

In any event, there is no indication here—nor any evidence from jurisdictions that have, for decades, rejected the Fifth Circuit's arbitrary rule—that requiring the government to pay just compensation for taking the kinds of property interests at stake here has hamstrung eminent domain. See *S. Cal. Edison Co.* v. *Bourgerie*, 507 P.2d 964, 967-968 (Cal. 1973) ("Conceding the possibility that the cost of condemning property might be increased somewhat

by awarding compensation for the violation of building restrictions, we cannot conclude that such increases will significantly burden exercise of the power of eminent domain.").

Neither the Fifth Circuit nor other courts taking the minority position have, moreover, offered any reason for why covenantal rights and easements, which "indisputabl[y]" are property—and compensable—within the meaning of the Fifth Amendment, see *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961), should be treated differently. As court decisions and commentators have long noted, covenantal rights and easements are functionally and legally indistinguishable. See, *e.g.*, *Vuono*, 143 A. at 248; *Ladd*, 24 N.E. at 859 (Holmes, J.,) (describing deed restriction requiring "land unbuilt upon for the benefit of the light, air, etc., of neighboring land" as "an easement, [for which] the city must pay."); *Allen*, 133 N.W. at 320 ("Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for the public use without due process of law and compensation therefor."). Indeed, this Court has explicitly analogized real covenants to easements in holding that (for other purposes) a covenant is "an interest in lands." See *Chapman* v. *Sheridan-Wyo. Coal Co.,* 338 U.S. 621, 626-627 (1950). And as the Supreme Court of California explained in overruling its prior decision adopting the minority rule, treating easements and covenants differently is "rationally indefensible," *Bourgerie*, 507 P.2d at 967, especially because "the violation of a building restriction [can] cause far *greater* damage * * * than the appropriation of a mere right of way," *id.* at 966 (emphasis added)

(overruling *Friesen* v. *City of Glendale*, 288 P. 1080 (Cal. 1930)).

Finally, the minority rule disregards the considerations of fairness and certainty that this Court has long recognized underlie the Takings Clause. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness * * * as it does from technical concepts of property law." *United States* v. *Fuller*, 409 U.S. 488, 490 (1973). Neither the court below nor the government offered any explanation how "fairness and justice" would support having the MCTA (or the owners of the 44 properties that remain), rather than the "public as a whole," shoulder the burden of providing the government more convenient access to its repair project, *Armstrong*, 364 at 49. The minority rule also disregards the important "investment backed expectations," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), real covenants protect. Developers would not undertake ambitious projects like Mariners Cove unless the development could enforce assessments, keyed to necessary expenses, and other covenantal obligations for the life of the project. See pp. 28-31, *infra*. Covenantal rights, like other property rights, ultimately protect the individual's ability to plan for the future and make meaningful decisions. See *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.,* 130 S. Ct. 2592, 2613 (2010) (Kennedy, J., concurring in judgment) ("The right to own and hold property" "without the fact or even the threat of * * * expropriation" is "necessary to the exercise and preservation of freedom").

Indeed, the United States itself recognizes the necessity of protecting such interests. As noted above, p. 9, *supra*, it has advanced the opposite position from what it argued below when *it* was the beneficiary of assessments tied to lands condemned by a state. In *California* v. *25.09 Acres of Land*, 329 F. Supp. 230, 231 (S.D. Cal. 1971), for example, the government persuaded the court that the Constitution required compensation because the acquisition would "remove a portion of the assessment base, thereby depriving the UNITED STATES of a beneficial interest * * * and increasing the annual * * * charges assessed against [it and other] remaining owners." *Ibid.* This is right and "the validity of a doctrine [should] not depend on whose ox it gores." *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

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The court below recognized, correctly, that MCTA's right to collect assessments was a property interest. That is all that is needed to require just compensation under the Fifth Amendment. The contrary holding by the Fifth Circuit creates needless uncertainty and unjustified complexity in Fifth Amendment jurisprudence and should be reversed.

III. This Recurring Issue Is One Of National Importance

Respect for property rights is deeply rooted in our Constitution and our legal tradition. Indeed, the Founding generation understood "acquiring and possessing property, and having it protected, [as] one of the natural, inherent, and unalienable rights of man." *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.)

304, 309 (C.C.D. Pa. 1795). The Takings Clause embodies these values and "was designed 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*, 364 at 49. The decision below violates this cardinal principle in a way that jeopardizes the property rights of millions of citizens.

The "covenant running with the land[] is effectively a constitution establishing a regime to govern property held and enjoyed in common." Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 Emory L.J. 977, 990 (1975). In particular, it establishes and governs neighborhood associations, which represent "the most important property right development in the United States since the creation of the modern business association." Robert H. Nelson, Private Neighborhoods and the Transformation of Local Government xiv (Urban Inst. Press 2005). Because of their importance in securing private regulation of property, covenants are ubiquitous in modern property law. As of 2012, 63.4 million Americans (more than 20% of the population) lived in association-governed communities that depend on covenants. Cmty. Ass'ns Inst., Industry Data: National Statistics, http://www.caionline.org/info/research/Pages/default.aspx (last visited on June 6, 2013). In 2005, there were more than 250,000 neighborhood associations in the United States, about ten times the number of general-purpose municipalities, Nelson, *supra*, at 15, and the value of housing governed by them "exceed[ed] $1.8 trillion, which [wa]s more than 15 percent of the value of all residential real estate (and 9 percent of the value of real estate of all

kinds)," *id.* at 73, and "about one-third of the total value of all the shareholdings in U.S. business corporations," *ibid.* The question presented thus affects not only the single most important asset many Americans own—the home—but also a major segment of the American economy. That fact alone demonstrates why the decision below warrants review.

Covenants are often, moreover, a significant component of real property's total value. One report recently concluded that covenants increased the overall value of property in community associations and condominium developments by six percent. Amanda Agan & Alexander Tabarrok, *Do Homeowners Associations Raise Property Values? What Are Private Governments Worth?*, 28 Regulation 17 (2005), *available at* http://www.cato.org/sites/cato.org/files/serials/files/regulation/2005/9/v28n3-2.pdf (last visited June 6, 2013). This is no recent phenomenon. Covenants have long been recognized as "among the very elements that may contribute to the value of the lots affected thereby." *Dixon* v. *Van Sweringen Co.*, 166 N.E. 887, 889 (Ohio 1929).

Why have covenants become so widespread? Precisely because they provide developers with the necessary tools to plan large-scale community developments and pursue important objectives. Covenants allow developers to plan streets, preserve open space between buildings, designate and develop community land, and enforce fundamental private preferences in the residential context. Marc A. Weiss, The Rise of the Community Builders 70 (1987). Likewise, covenants are generally the primary, or even the *only*, source of planning and governance in commercial resort development. In

such contexts, covenants provide developers with necessary flexibility in organizing and regulating the community. James J. Scavo, *How to Draft Mixed-Use Community Restrictive Covenants*, Prac. Real Est. Law. 27 (2002). Covenants likewise form the basis for modern shopping malls, allowing landlords to manage competition, govern and maintain common shopping areas, and regulate rogue tenants. Benjamin Weinstock & Ronald D. Sernau, *High-End Retail Leasing*, 28 Prac. Real Est. Law. 29-34 (2012).

Covenants are also an important tool for environmental conservation. Thomas J. Coyne, *How to Draft Conservation Easement Agreements*, 19 Prac. Real Est. Law. 47, 48 (2003). The National Conservation Easement Database has so far registered over 95,000 conservation easements—which, despite their name, are actually covenants, see William B. Stoebuck & Dale A. Whitman, The Law of Real Property § 8.13, at 470 (3rd ed. 2000)—encumbering over 18 million acres. See National Conservation Easement Database, http://nced.conservationregistry.org (last visited June 5, 2013). It estimates, however, that there are now actually 40 million acres encumbered by such covenants in the U.S. *Ibid.* That is more than 18 times the size of Yellowstone National Park (which consists of 2,221,766 acres). See National Park Service, Yellowstone Fact Sheet, http://www.nps.gov/yell/planyourvisit/factsheet.htm (last visited June 5, 2013). If allowed to stand, the decision below would severely undercut the effectiveness of this conservation tool. See Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897, 1905 (2008) ("Denying conservation easements status as

compensable property for eminent domain purposes * * * would have significant adverse consequences for conservation easements as a land protection tool.").

The decision below puts the reliability of all such covenants in jeopardy. The predictable consequence of allowing government actors to seize or destroy covenants without fear of owing just compensation is that the government will condemn more of them and undermine property owners' expectations of their value. That, in turn, will decrease reliance on covenants in the residential, commercial, and conservation contexts. Property owners will come to understand that their private property arrangements are protected only as a matter of governmental grace.

Indeed, governments routinely take covenantal rights. State and local governments, for example, often take real property for purposes the controlling covenants would not allow, including for building highways,[3] schools,[4] and water facilities[5] and so

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[3] See, *e.g., California* v. *25.09 Acres of Land*, 329 F. Supp. 230 (S.D. Cal. 1971); *Burma Hills Dev. Co.* v. *Marr*, 229 So. 2d 776 (Ala. 1969); *Rudder* v. *Limestone Cnty.*, 125 So. 670 (Ala. 1929); *Ark. State Highway Comm'n* v. *McNeill*, 381 S.W.2d 425 (Ark. 1964); *Anderson* v. *Lynch*, 3 S.E.2d 85 (Ga. 1939); *State* v. *Human Relations Research Found.*, 391 P.2d 513 (Wash. 1964).

[4] See, *e.g.*, *Town of Stamford* v. *Vuono*, 143 A. 245 (Conn. 1928); *Peters* v. *Buckner*, 232 S.W. 1024 (Mo. 1921); *Meredith* v. *Washoe Cnty. Sch. Dist.*, 435 P.2d 750 (Nev. 1968); *Sch. Dist. No. 3* v. *Country Club of Charleston*, 127 S.E.2d 625 (S.C. 1962).

[5] See, *e.g.*, *City of Raleigh* v. *Edwards*, 71 S.E.2d 396 (N.C. 1952); *City of Shelbyville* v. *Kilpatrick*, 322 S.W.2d 203 (Tenn. 1959); *Harris Cnty. Flood Control Dist.* v. *Glenbrook Patiohome Owners Ass'n*, 933 S.W.2d 570 (Tex. App. 1996).

disrupt the structures of residential subdivisions. No one questions governments' basic authority to do these things; nor should anyone question that the Constitution requires the government to pay for the property rights that it destroys in the process. The situation in this case is quite common and, if the lower court's ruling and those like it are allowed to stand, government regulation risks disrupting and undermining the reliability of a critical property right.

Precisely because covenants are so widely used and increasingly likely to run headlong into government regulation, uniformity in their protection against government intrusion is essential. This Court has long emphasized uniformity in decisions regarding just compensation. See, *e.g.*, *Kelo* v. *City of New London*, 545 U.S. 469, 488-490 (2005); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39, 63. As explained above, lower courts are confused and have applied several different standards in determining the compensability of covenants. Only a clear, uniform rule can protect established reliance interests in their use.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HENRY W. KINNEY
MICHAEL L. DESHAZO
JOHN D. MIRANDA
Kinney, Ellinghausen, Richard & DeShazo
1250 Poydras Street, Suite 2450
New Orleans, Louisiana 70113
(504) 524-0206

DANIEL R. ORTIZ*
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
dro@virginia.edu
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street 8th Floor
New York, NY 10013
(212) 334-8813

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania Ave., NW., Suite 600
Washington, DC 20004
(202) 639-6500

**Counsel of Record*

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