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Honorable Tani G. Cantil-Sakauye,
Chief Justice, and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *Lockaway Storage v. Co. of Alameda*, No. S211470

To the Chief Justice and the Associate Justices of the California Supreme Court:

The California Coastal Commission, and the California State Lands Commission, respectfully request that this court grant the County of Alameda's petition for review in *Lockaway Storage v. Co. of Alameda*. Review is needed to settle an important question of takings clause law: did the United States Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528 invalidate or alter this Court's decision in *Landgate, Inc. v. California Coastal Com'n* (1998) 17 Cal.4th 1006? The decision below highlights the need for review, explaining that "since *Lingle* was decided, several courts have questioned whether the *Landgate* rule remains viable." (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 189.) This Court's review is needed so that litigants and lower courts can understand the rule of law they should apply where governmental officials make a mistake interpreting a law. The absence of clear direction creates a chilling effect on officials engaged in a wide range of activities, including making land use decisions, enforcing criminal laws, and regulating businesses.

As we will explain, rather than invalidating *Landgate*, the United States Supreme Court's decision in *Lingle* calls for an enhanced version of the *Landgate* approach. While *Landgate* held that no taking can occur when government officials, in good faith, misinterpret a law and therefore delay issuing a permit, *Lingle's* reasoning dictates that the takings clause does not apply regardless of the officials' intentions. This is a due process issue, not a takings issue. Under *Lingle*, when government officials' actions are legally invalid, they fail to meet the takings clause's "public use" requirement, and therefore cannot be takings. But those actions can potentially violate the more deferential due process clause, and possibly other constitutional, statutory or common law provisions.

1. Interest of the Amici

Amicus curiae California Coastal Commission is the state agency charged with primary responsibility for the implementation of the California Coastal Act of 1976. (Pub. Resources Code, § 30000 et seq.) The Coastal Act designates the Commission as the state coastal planning agency for any and all purposes. (Pub. Resources Code, § 30330.) The Act grants the Commission original permit jurisdiction over various coastal projects such as development on all state-owned tidelands in the California coastal zone (Pub. Resources Code, § 30519(b)), and appellate review of many locally-issued coastal permits. (Pub. Resources Code, § 30603.) Given its planning and permitting roles, the Commission has a strong interest in ensuring that it, along with local governments—which have a major role in implementing the Coastal Act (see *Pacific Palisades Bowl Mobile Estates v. City of Los Angeles* (2012) 55 Cal.4th 783, 794)—are able to further the Act’s goals of protecting the coastal zone’s ecological balance and promoting carefully planned development consistent with that protection. (Pub. Resources Code, § 30001.)

Amicus curiae California State Lands Commission oversees the State’s sovereign lands. For example, it has exclusive jurisdiction over all of the State’s ungranted tidelands and submerged lands, as well as the beds of navigable lakes and rivers. (Pub. Resources Code, § 6301.) Moreover, it has residual authority over such lands where the Legislature has granted them to local governments. (*Ibid.*) The Commission administers these lands consistent with the common law public trust doctrine, which limits their uses to commerce, navigation, fishing, as well as environmental and recreational purposes. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60.) In overseeing sovereign lands, the Commission grants permits and leases and takes other actions concerning those lands. Property owners can and have challenged Commission actions concerning sovereign lands as takings where the owners disagreed with the Commission’s interpretation of the law. (See, for example, *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 243 [claiming that the Commission incorrectly asserted ownership of property between the high and low water in navigable lakes and rivers and, as a result, took private property].) In exercising jurisdiction over ungranted lands, and residual authority over granted lands, the Commission has an interest in seeing that local governments, and it, are not dissuaded from protecting the public trust for fear of an undue exposure to takings claims.

2. Lower Court Confusion

Landgate held that the Coastal Commission’s “mistaken assertion of jurisdiction,” corrected on appeal, which resulted in a 2-year delay in Landgate’s project was a “normal delay” that did not constitute a taking. (*Id.* at 1010.) The Court indicated, however, that a different case would be presented if the Commission’s “position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it.” (*Id.* at 1024.) In determining whether a delay was unreasonable, however, *Landgate* used a “substantially advances” formula that the United States Supreme Court subsequently rejected in *Lingle*. (See in particular *Landgate*, 17 Cal.4th at 1022-24 and 1029.) *Lockaway* therefore questioned whether *Landgate* is still good law. (See *Lockaway Storage v. County of Alameda, supra*, 216 Cal.App.4th 161, 189-90.)

The court in *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229 similarly questioned *Landgate's* validity given *Lingle*. It suggested that *Lingle* may have invalidated *Landgate*, but ultimately avoided that question: "Because we conclude that there was no taking under any theory, we need not and do not decide whether *Lingle* undercuts *Landgate*." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 275, fn. 47.) Moreover, at least one litigant has pointed to *Landgate* in arguing that, while the substantially advance "formula is no longer viable under the Fifth Amendment, it remains part of California takings law, in part based on the use of that standard by the California Supreme Court in *Landgate . . .*" (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1281.) The *Allegretti* court did not outright reject that argument, but rather applied *Landgate's* standards and concluded that even if *Landgate* established a California substantially advances test, the county's actions did not amount to a taking under that test. (*Id.* at 1281.) Courts and litigants have therefore exhibited considerable confusion and divergent positions concerning the impact of *Lingle* on *Landgate*.

3. The Need to Resolve This Confusion

The question of whether governmental mistakes can be subject to takings claims, as opposed to claims under other constitutional, statutory or common law provisions, does not merely affect the amici Commissions and local governments that carry out related missions. It impacts a large number of state and local agencies. As both the instant case and *Landgate* show, this issue commonly arises in the permitting context. Local governments such as the County of Alameda frequently issue land use permits. And at the state level, agencies grant permits concerning a wide range of activities.¹ Property owners likewise bring takings claims when government denies them a license. (See, for example, *Zarmach Oil Services, Inc. v. U.S. Dept. of the Treasury* (D.D.C. 2010) 750 F.Supp.2d 150, 159.) California state agencies issue licenses for large numbers of businesses, trades, and professions. (See 8 Witkin, Summary 10th (2005) Const. Law, § 1079, p. 697.)

In addition, the issue can arise outside of the permitting and licensing context. For example, where litigants claimed that a California Highway Patrol and a local police officer's impounding of their vehicles were takings, the court held that if the officers acted because they misinterpreted the California Vehicle Code, there could not be a taking because the public use requirement outlined in *Lingle* would not be met. (See *Miranda v. Bonner* (C.D. Cal., Mar. 4, 2013, CV 08-03178 SJO VBKX) 2013 WL 794059.)² Where an attorney alleged a taking

¹ A few of the hundreds of areas requiring permits from state agencies include permits for: acquiring or keeping an assault weapon (Pen. Code, § 31000), selling securities (Corp. Code, § 25113), selling insurance (Ins. Code, § 1800.8), constructing power plants (Pub. Resources Code § 25500), discharging pollutants into navigable waters (Wat. Code, § 13370), constructing hazardous waste facilities (Health & Safety Code, § 25200 et seq.), building structures on waterways and levees (Water Code, § 8710), taking (killing) endangered species (Fish & G. Code, § 2081), altering state highways (Sts. & Hy. Code, § 670.1), using certain agricultural pesticides (Food & Agric. Code, § 14006.5), working in child care programs (Ed. Code, § 80109) and performing oral surgery (Bus. & Prof. Code, § 1638).

² Unpublished federal opinions are citable in California state courts as persuasive, but not precedential, authority. (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 996, fn. 4.)

regarding a superior court system that appointed attorneys as arbitrators while providing minimal compensation, the court held that the takings claim fails if the court lacked the authority to require the attorney to serve, because, as *Lingle* explains, that clause presumes that the state's action is authorized. (*Scheehle v. Justices of Supreme Court of Ariz.* (9th Cir. 2007) 508 F.3d 887, 895.) And in a case involving federal officials that could apply to state and local agencies as well, the Federal Circuit rejected a takings claim against officials who in essence improperly refused to release owners of low-income housing projects from rent control requirements. (*Cienega Gardens v. United States* (Fed. Cir. 2007) 503 F.3d 1266.) The court explained that because Congress had repealed the law allowing the refusal, the refusal was unauthorized and could not amount to a taking. (*Id.* at 1287, fn. 18.)

Given this broad reach, it is important for this Court to resolve the degree of discretion courts should afford agencies and officials when they make a mistake that can impact property rights. While serious abuses should be subject to due process and a potential variety of other protections,³ the application of the takings clause with its less deferential standards could deter financially pressed agencies and officials from protecting the public.

4. The Proper Approach After *Lingle*

Prior to *Lingle*'s repudiation of the substantially advances formula and related tests, *Landgate* could have been viewed in one of two ways:

1. As a stand alone, independent liability test. That is, where government's misinterpretation of the law fails to substantially advance a legitimate governmental interest, it is a temporary taking. After *Lingle*, however, *Landgate* can no longer be viewed as stating an independent liability test. *Lingle* held that while a governmental action that fails to meet the "substantially advance" test might violate the due process clause, the violation cannot be the basis for a taking. Moreover, for our purposes this Court construes California's takings clause (Article I, §19 of the California Constitution) consistent with the federal clause. (See *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664 [explaining that aside from cases involving physical damages to property, "we appear to have construed the clauses congruently"].) Therefore, given *Lingle*, *Landgate* cannot be interpreted as stating a test to establish a taking.

2. As a defense. In some cases, absent *Landgate*, a delay might in theory impose a taking under traditional takings tests. The main test focuses on a regulatory action's economic impact on property. (See *Lingle*, 544 U.S. at 538, describing the factors outlined *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104.) *Landgate*, however, indicated that "a

³ For example, government's singling out an individual for differential treatment without a rational basis could violate the Equal Protection Clause. (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) Government's seizing of property could violate the Fourth Amendment. (*De-Occupy Honolulu v. City and County of Honolulu* (D. Hawaii, May 21, 2013, CIV. 12-00668 JMS) 2013 WL 2284942.)

delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is . . . in the nature of a ‘normal delay’ that does not constitute a taking.” (*Landgate, Inc. v. California Coastal Com'n* (1998) 17 Cal.4th 1006, 1010.) *Landgate* based this “normal delay” rule on *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304. That case established the temporary taking concept, that is, “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” (*Id.* at 321.) But *First English* indicated that “normal delays in obtaining building permits” would not be subject to this rule. (*Ibid.*) *Landgate* therefore suggested that even if government’s action delaying a project would impose a taking under traditional takings tests, if government’s action is a “normal delay,” it is not a taking.

However, *Landgate* conditioned its holding. The “normal delay” defense does not apply where an agency’s “position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay [because] . . . [s]uch a delaying tactic would not advance any valid government objective.” (*Landgate, Inc. v. California Coastal Com'n*, 17 Cal.4th at 1024.) This aspect of *Landgate* is in tension with *Lingle*.

Lingle indicates that no governmental misinterpretation of a law can be a taking—even if the governmental action is “arbitrary.” *Lingle* explained that while arbitrary acts might violate the due process clause, the takings clause only applies to takings “for public use,” and arbitrary actions would not be for a public use. (*Lingle*, 544 U.S. at 543.) *Lingle* emphasized that the takings clause “does not bar” government actions. Rather, it requires compensation “in the event of otherwise proper interference amounting to a taking.” (Citation omitted; emphasis added by Court.) (*Lingle*, 544 U.S. at 543.) But if the governmental action is not proper, it cannot be a taking. As the Court explained, “if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.” (*Ibid.*)

In the instant case, for example, assuming that Measure D permitted the Lockaway project, County officials could not have still stopped the project by paying compensation. They simply had no right to stop the project. Under *Lingle*, no amount of compensation could authorize County officials to stop a permissible project.

Given *Lingle*, the doctrinally sound approach is for this Court to modify *Landgate* by explaining that improper governmental actions by their nature cannot be takings because they fail to meet that clause’s public use requirement. That approach would be consistent with recent decisions addressing this question. For example, in *Miranda v. Bonner*, *supra*, 2013 WL 794059, the United States District Court for the Central District of California relied upon this reasoning in rejecting takings claims against California Highway Patrol and City of Los Angeles police officers, where plaintiffs claimed that state law did not authorize the officers’ impounding of their vehicles. The court explained in reviewing the claim against the City that “[e]ven if the LAPD did impound Giron’s vehicle in violation of Section 14602.6, such a seizure would not

constitute a public use because it would not be an 'otherwise proper interference amounting to a taking.' *Lingle*, 544 U.S. at 543."

The United States District Court for the Northern District of California likewise relied upon this reasoning in rejecting a takings claim against a county in *Mateos-Sandoval v. County of Sonoma* (N.D. Cal., Jan. 31, 2013, C11-5817 TEH) 2013 WL 415600. In that case, a Sonoma County deputy sheriff had impounded a driver's vehicle pursuant to Vehicle Code section 14602.6 on the ground that the driver did not have a valid California driver's license. The court, however, ruled that that provision did not authorize the deputy's action, and that the action may have therefore amounted to an unlawful seizure under the Fourth Amendment of the United States Constitution. The court then turned to the taking claim. Citing *Lingle*, the court explained that an unlawful seizure could not be a taking, because it would not be "for public use." (*Ibid.*)

Other federal district courts have reached the same conclusion. In *Sanchez v. City of Fresno* (E.D. Cal., Dec. 26, 2012, 1:12-CV-00428-LJO) 2012 WL 6719556, the United States District Court for the Eastern District of California reviewed takings and other claims by a homeless individual against a city when its employees seized and destroyed his property. Pointing to the court's reasoning in *Mateos-Sandoval*, the court held that if the plaintiff prevails on any of his claims that his property was unlawfully seized and destroyed, then "he will have demonstrated that the destruction was *unlawful*, and therefore could not possibly be a taking because the conduct was not a 'proper interference' with his property rights." (Emphasis in original.) The United States District Court for Hawaii adopted the same reasoning in rejecting protestors' takings claims based on their assertion that city personnel seized and destroyed the protestors' property. In *De-Occupy Honolulu v. City and County of Honolulu* (D. Hawaii, May 21, 2013, CIV. 12-00668 JMS) 2013 WL 2284942, the court held that the protestors' complaint "fails to allege a plausible claim for failure to allege that the 'taking' was for 'public use.'" The court pointed to both *Sanchez* and *Lingle* in explaining that an "*unlawful* interference with Plaintiffs' property is not the proper subject of a Takings Clause claim." (Emphasis in original.)

Moreover, as previously noted, courts have taken a similar approach in cases involving attorney appointments (*Scheehle v. Justices of Supreme Court of Ariz.* (9th Cir. 2007) 508 F.3d 887, 895) and the release of building owners from low income housing requirements. (*Cienega Gardens v. United States* (Fed. Cir. 2007) 503 F.3d 1266, 1287 n. 18.)

Although cases such as these interpret *Lingle* as precluding takings claims based upon invalid governmental actions, *Lockaway* found a taking even though it held that the governmental actions were invalid. This Court's review of *Lockaway* is therefore needed to resolve two important issues. First, is *Landgate* still viable? Second, if *Landgate* is viable, should it be modified to provide that invalid governmental actions cannot be takings but should instead be subject to due process review?

5. Conclusion

The California Coastal Commission and California State Lands Commission respectfully request that the Court grant the petition for review.

Sincerely,



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Attachments:

Miranda v. Bonner
Mateos-Sandoval v. County of Sonoma
Sanchez v. City of Fresno
De-Occupy Honolulu v. City and County of Honolulu