No. 12-1453

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

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Martin S. Kaufman
Counsel of Record
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org

Counsel for Amicus Curiae

July 15, 2013

QUESTION PRESENTED

Whether the right to collect assessments or real covenants constitute compensable property under the Takings Clause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. iii

INTEREST OF *AMICUS CURIAE*. 1

SUMMARY OF ARGUMENT. 3

REASONS FOR GRANTING THE PETITION.. 8

I. THE FIFTH CIRCUIT'S RULE ON COMPENSABLE INTEREST IS WRONG. 8

A. The Fifth Amendment Intentionally Makes the Taking of Private Property Inconvenient. 11

B. The Fifth Circuit's Holding Is Inconsistent With This Court's Analysis of Property Rights.. 14

C. The Fifth Circuit's Holding That Real Covenants That Run With the Land Are Not Compensable Is Not Supported By This Court's Precedents. 18

II. THE ISSUE IS OF NATIONAL IMPORTANCE. 19

A. The Prevalence of "Common Interest Developments". 20

B. Societal Benefits of Common Interest Developments. 21

1. CIDs preserve open space by encouraging "clustering."..... 21

2. CIDs provide services in place of overburdened local governments.. 23

3. CIDs provide affordable housing for retirees and lower-income families.. 23

C. Homeowners Association Assessments or Fees Are Essential to Common Interest Developments... 24

CONCLUSION. 27

TABLE OF AUTHORITIES

Page(s)

Adaman Mut. Water Co. v. United States,
278 F.2d 842 (9th Cir. 1960).. . . . . *passim*

Ark. Game and Fish Comm'n v. United States,
131 S.Ct. 511 (2012). 11, 13

Armstrong v. United States,
364 U.S. 40 (1960).. 12

Bauman v. Ross, 167 U.S. 548 (1897). 15

Boston Chamber of Commerce v.
City of Boston, 217 U.S. 189 (1910). 15

Dolan v. City of Tigard, 512 U.S. 374 (1994).. . . 3

First English Evangelical Lutheran Church
of Glendale v. Cnty. Of Los Angeles,
482 U.S. 304 (1987).. . . . . 10, 12, 13

Koontz v. St. Johns River Water
Management District, 133 S.Ct. 2586
(2013).. . . . . 17, 18

Lynch v. Household Fin. Corp.,
405 U.S. 538 (1972).. 3

Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). . . 12

Ruckelshaus v. *Monsanto Co.*,
467 U.S. 986 (1984). 9, 17

United States v. 0.073 Acres of Land,
More or Less, Situate Parishes of
Orleans and Jefferson, La.,
705 F.3d 540 (5th Cir. 2013). . . . . *passim*

United States v. 0.073 Acres of Land,
2011 WL 5419725 (E.D. La. 2011). 5- 6

United States v. Dickinson,
331 U.S. 745 (1947). 15

United States ex rel. Tenn. Valley Auth.
v. Powelson, 319 U.S. 266 (1943). 9, 19

United States v. Gen. Motors Corp.,
323 U.S. 373 (1945). . . . . *passim*

United States v. Grizzard,
219 U.S. 180 (1911). 15

United States v. Miller,
317 U.S. 369 (1943). 10, 15, 16

Constitutional Provision

U.S. Const. Amend. V. 8

Miscellaneous

Amanda Agan & Alexander Tabarrok, *Do Homeowners Associations Raise Property Values? What Are Private Governments Worth?*, 28 Regulation (2005), *available at* http://www.cato.org/sites/ cato.org/files/serials/files/regulation/2005/9/ v28n3- 2.pdf.. 25

Cal. Ass'n of Realtors, *A Basic Guide to Owning a Home in, and the Administration of, a Common Interest Development* (2010), at 10-11, *available at* http://www.car.org/ media/pdf/ legal/cid-brochure- 2010/.. 24

Christopher Baum, *The Benefits of Alternate Dispute Resolution in Common Interest Development Disputes*, 84 St. John's L. Rev. 907 (2010). 21, 23, 24

Cmty. Ass'ns Inst., *Industry Data, National Statistics*, available at http://www.caionline.org/ info/research/Pages/default.aspx. 20

Evan McKenzie, Beyond Privatopia: Rethinking Residential Government (2011). 23

Evan McKenzie, Privatopia:
Homeowner Associations and the Rise
of Residential Private Government (1994). . 22

John W. Fisher, *The Evolution of Restrictive Covenants in West Virginia,*
100 W. Va. L. Rev. 55 (1977). 22

Joseph Aiu, *Consumer Warning: Underfunded Homeowners Associations, California Department of Real Estate* (2012),
available at http://www.dre.ca.gov/
files/ pdf/ca/2012/ConsumerAlert_
UnderfundedHOAs.pdf. 25

Judith Bernstein-Baker, *Cooperative Conversion: Is it Only for the Wealthy? Proposals that Promote Affordable Cooperative Housing in Philadelphia*,
61 Temp. L. Rev. 393 (1988). 24

MCTA Answer (Doc. No. 20 at 3), in
United States v. 0.073 Acres of Land
(E.D. La., Nos. 09–3770, etc., Sept. 3, 2009). . 5

MCTA Motion for Partial Summary Judgment
(Doc. No. 59-4 at 3-4), in *United States v. 0.073 Acres of Land* (E.D. La., Nos. 09–3770,
etc., Sept. 9, 2011). 5

Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897 (2008). 23

Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 St. John's L. Rev. 3 (1999). 20, 24

Robert H. Nelson, *The Rise of Private Neighborhood Associations: A Constitutional Revolution in Local Government*, in The Property Tax, Land Use and Land Use Regulation (Dick Netzer ed., 2003).. 21, 22

Tom Pierce, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. Haw. L. Rev. 93 (1997). 21

INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has served as counsel for plaintiffs and *amici* in numerous "takings" cases, including: *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013) (*amicus* and co-counsel for *amici*); *Cole v. County of Santa*

---

[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amicus* brief was provided to the parties, the parties have consented to the filing of this *amicus* brief; copies of those consents have been lodged with the Clerk and *amicus* has complied with the conditions of such consent.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Barbara, 537 U.S. 973 (2002) (counsel for *amici* associations of small property owners in support of petition for certiorari in challenge to a state law procedural bar to claims for unconstitutional takings based on "ripeness"); *Sackett v. EPA*,132 S.Ct. 1367 (2012) (counsel for National Association of Manufacturers as *amicus* in challenge to issuance by Environmental Protection Agency of an administrative compliance order under § 309 of the Clean Water Act); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (counsel for real property owners' associations as *amici* in challenge to development moratoria); and *Brody v. Vill. of Port Chester*, 345 F.3d 103 (2d Cir. 2003) (co-counsel for plaintiff in due process challenge to taking of property for non-public use and inadequate notice of final decision to condemn).

This case is of particular interest to the Foundation because private homeowner association developments, known as "common interest developments," are an effective and efficient way to achieve environmental benefits such as preservation of open space, in an efficient way, based on consent of the property owners rather than by mandate from government, and they can often relieve governments of the burden of providing certain municipal services which, in the case of common interest developments, are provided by the homeowners association. The holding of the Fifth Circuit that the homeowners association's right to fees and dues is not

compensable renders provision of such services by and to the community more difficult if not impossible, deterring the use of common interest developments as a planning and development tool.

SUMMARY OF ARGUMENT[2]

The right to property is the civil and natural right that protects and guarantees all other rights. The primary "object of government" is to protect the property rights of every American, especially when the laws promote interference with the right to liberty and the right to property. The "interdependence" between these two rights requires protection for both, without either losing to the other. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Rights in property lie at the core of the Constitution and the liberties it seeks to protect. *Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

The decision of the Fifth Circuit below raises the question whether the Takings Clause requires the government to compensate private parties for the lost value of real covenants associated with land it condemns. In Louisiana, and in many states, such

---

[2] *Amicus* adopts the Statement of Petitioner.

real covenant rights are "intimately and inherently involved with the land and therefore binding [upon] subsequent owners" and thus compensable if taken by eminent domain. *United States v. 0.073 Acres of Land, More or Less, Situate Parishes of Orleans and Jefferson, La.*,705 F.3d 540, 546 n.4 (5th Cir. 2013); *see also Adaman Mut. Water Co.* v. *United States*, 278 F.2d 842, 849 (9th Cir. 1960).

This issue is particularly important for homeowners associations which depend on fees or dues paid by owners of individual units into a common fund used to defray the costs of providing services to the community, such as water, waste water treatment and disposal, maintenance of streets and roads, landscaping, and security. These are functions often provided by local governments, and, when borne by homeowners associations, local governments are relieved of those costs. If the Fifth Circuit's holding stands, homeowners associations will no longer be able to rely on such dues and fees if part of the development is taken by eminent domain, and the full burden of providing those services will fall upon the remaining non-expropriated households, thus jeopardizing the community's ability to provide those services.

The Mariner's Cove residential community is located near Lake Pontchartrain, Louisiana. Part of it was occupied by the United States Corps of Engineers in 2005 in the wake of Hurricane Katrina to facilitate the Corps' access to the 17th

Street Canal pumping station. *United States v. 0.073 Acres of Land*, 2011 WL 5419725, at *1 (E.D. La., Nov. 9, 2011). In June 2009, the United States filed an eminent domain proceeding against 14 of the 58 lots in the Mariner's Cove development, about a quarter of the homes in the development. *Id.*

The Mariner's Cove Townhouse Association (MCTA) filed an Answer and Declaration of Interest asserting that the Corps should be required to compensate MCTA for the loss of the annual assessments each lot was required to pay to MCTA under the terms of the association's "Declarations of Servitudes, Conditions and Restrictions." *Id.* The Declaration requires "each [lot] owner shall pay a proportionate 1/58 share of the expense of maintenance, repair, replacement, administration and operation of the properties, including water and sewer service." MCTA Answer (Doc. No. 20 at 3), in *United States v. 0.073 Acres of Land*, (E.D. La., Nos. 09–3770, etc., Sept. 3, 2009).

MCTA alleged that the 24% reduction in its assessment base (from the condemnation of 14 of the 58 lots) had drained its cash reserves and that its expenses for services to the remaining Mariner's Cove lots increased in 2010 despite the reduction in the number of lots in the development. MCTA Motion for Partial Summary Judgment (Doc. No. 59-4 at 3-4), in *United States v. 0.073 Acres of Land* (E.D. La., Nos. 09–3770,

etc., Sept. 9, 2011).[3] MCTA sought to have the United States pay the yearly assessments allocable to the 14 condemned lots from the time of the original occupation in 2005 or, alternatively, to pay a "lump sum" that MCTA could invest so the annual interest would make up for the diminished assessments. *See United States v. 0.073 Acres of Land*, 2011 WL 5419725, at *1. The United States moved to dismiss MCTA's claims because, *inter alia*, the loss of MCTA's "right to assess the taken property" was not compensable under federal or state law. *Id*. MCTA cross-filed a motion for summary judgment, asking the court to find that the United States must compensate it for the "diminution of its assessment base" resulting from the taking. *Id*. The district court held that the United States did not owe MCTA compensation for the diminution of its assessment base. *Id*. at *6.

On appeal to the Fifth Circuit, MCTA argued that the district court had ignored the broader legal concept laid out in *Adaman* regarding the taking of intangible property rights: "if an interest in land is lost as a result of the taking of the parcel to which the interest attached, a direct connection with the physical substance [of the land] condemned is established" and just compensation is required. *Adaman*, 278 F.2d at 846.

---

[3] The United States moved for judgment of the pleadings, and the district court "takes as true the allegations in MCTA's Answer for purposes of this Motion," as required by Fed.R.Civ.P. 12(c). *Id*. at *3.

The United States argued that MCTA's loss of assessments were incidental, non-compensable, losses under the Fifth Amendment.

The Fifth Circuit acknowledged that Louisiana "recognizes the right to collect assessment fees as a covenant that runs with the land," and is a "real covenant," and thus a property interest. *United States v. 0.073 Acres of Land*, 705 F.3d at 546. The Fifth Circuit held that the diminution of MCTA's assessment base was "incidental to the condemnation" and therefore compensation was "barred by the consequential loss rule." *Id*. The panel held that "the consequential loss rule applies because MCTA's right to collect assessments is a real covenant that functions like a contract" and, unlike *Adaman*, the interest was not "directly connected" with the physical substance of the land. *Id*., (*citing Adaman*, 278 F.3d at 845). The panel acknowledged that the "majority view" of state and federal courts is that real covenants are compensable. 705 F.3d at 547-48. Citing a "strong minority view," however, the panel relied on "*theories grounded in public policy concerns*" that support the view that MCTA's lost property interest is not compensable. *Id*. at 548 (emphasis added).

The first "theory" is that holding covenants compensable "might unduly burden the government's ability to exercise its power of eminent domain." *Id*. A second "theory" is that covenants are "akin to contracts" and thus subject

to the consequential loss doctrine. *Id*. The panel then simply declared that it "share[d] these concerns" and that the "right to collect assessments, and similar real covenants" are "fundamentally different in the takings context from other compensable intangible property, such as easements." *Id*. The panel asserted that "But for its inclusion in the [MCTA] Declarations, the real covenant for which MCTA seeks compensation would amount to nothing more than a service contract between the landowners . . . and MCTA." *Id*. at 548-49.

The Fifth Circuit concluded that the interest asserted in *Adaman* was distinguishable from the interest claimed by MCTA because it was "directly connected" to a physical substance in the land, whereas MCTA's was not. *Id*. at 550-51.

REASONS FOR GRANTING THE PETITION[4]

I. THE FIFTH CIRCUIT'S RULE ON COMPENSABLE INTEREST IS WRONG

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." *U.S. Const. amend. V.*

---

[4] We believe, and respectfully submit, that Petitioner has established beyond peradventure that there is a clear and significant circuit split, and we do not address that issue.

> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question . . . . The constitutional provision is addressed to *every sort of interest the citizen may possess*.

United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945) (emphasis added).

"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 ex rel. Tenn. Valley Auth. v. Powelson,* 319 U.S. 266, 279 (1943); *see also Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984) ("[W]e are mindful of the basic axiom that [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (citations omitted). Thus, Louisiana law governs whether MCTA's right to collect assessments is a property interest, and under Louisiana law the right to assessments is a property interest. 750 F.3d at 546.

For the purposes of the Fifth Amendment, property refers to the relationship between a citizen and a physical thing, and it includes all of

the interests that a citizen possesses, *Gen. Motors Corp.*, 323 U.S. at 378, and property owners must be fully compensated for private property taken for public use. *United States v. Miller*, 317 U.S. 369, 373 (1943).

The Fifth Circuit correctly found that "MTCA's right to collect assessment is a property interest" but incorrectly concluded that the Fifth Amendment does not require compensation for MTCA's property interest in assessments. 705 F.3d at 546. The Fifth Circuit recognized that previous cases denying compensation "do not concern losses of property" and merely "concern business losses and frustration of contracts." *Id.* at 547. Nevertheless, it found that the Fifth Amendment does not requires compensation for real covenants that are not "directly connected with the physical substance of the land" because they are "akin to contracts" and because compensation would "unduly burden the government's ability to exercise its power of eminent domain." *Id.* at 547-48.

The Fifth Circuit's conclusion was in error for a number of reasons. *First*, the Fifth Amendment intentionally limits the flexibility of the government, preventing it from taking property without compensating owners. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987). *Second*, the definition of property for Fifth Amendment purposes and this Court's analysis of "just

compensation" imply that real covenants should be compensated regardless of whether they inhere in the land. *Gen. Motors*, 323 U.S. at 377-78. Moreover, the Fifth Circuit's reliance on a "public policy" that tilts in favor of liberal use of the eminent domain power is directly counter to this Court's view on the subject. *Ark. Game and Fish Comm'n v. United States,* 131 S.Ct. 511 (2012). *Third*, the panel's decision creates unnecessary ambiguity as to what property interests require compensation.

A. The Fifth Amendment Intentionally Makes the Taking of Private Property Inconvenient.

One of the mainstays of the Fifth Circuit's opinion was that:

> Recognizing MCTA's right as compensable under the Takings Clause would allow parties to recover from the government for condemnations that eliminate interests that do not stem from the physical substance of the land. This would unjustifiably burden the government's eminent domain power.

705 F.3d at 548-49. The panel cited no authority at all for this "unjustifiable burden" theory. In fact, it runs directly counter to this Court's teaching.

The Fifth Amendment "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it

needs." *Gen. Motors*, 323 U.S. at 377. Almost a century ago, Justice Holmes reflected on the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). This compensation requirement "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 v. United States*, 364 U.S. 40, 49 (1960).

> The Fifth Amendment
>
> > is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

First English Evangelical Lutheran Church, 482 U.S. at 315 (citation omitted) (emphasis in original). Indeed, the Fifth Amendment intentionally constrains the power of the government, confining the scope of government actions to protect individuals from unjust governmental encroachments. *Id*. at 321.

The Fifth Circuit's "public policy" rationale has been rejected by this Court as recently as this

term:

> Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction.

Ark. Game and Fish Comm'n v. United States, 131 S.Ct. 511, 521 (2012) (citations omitted).

The Fifth Circuit seems oblivious to the fundamental balance between governmental functions and individual rights sought in the Constitution and especially the Bill of Rights, and that

> [S]uch consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them*.

First English Evangelical Lutheran Church, 482 U.S. at 321 (emphasis added).

Simply put, the potential cost to the government and requiring the government to be judicious and circumspect in its use of eminent domain power provides no basis for ignoring the Fifth

Amendment by denying compensation for the taking of a private property interest.

B. The Fifth Circuit's Holding Is Inconsistent With This Court's Analysis of Property Rights.

The Takings Clause requires the government to compensate owners for property taken, but it does not require the compensation of "consequential losses." *Gen. Motors*, 323 U.S. at 379 (listing the "future loss of profits, the expense of moving removable fixtures . . . [and] the loss of good-will that inheres in the location of the land" as examples of consequential losses). The Fifth Circuit agreed that real covenants that "physically inhered in the land itself" must be compensated. 705 F.3d at 551. In contrast, it found that real covenants not "directly connected with the physical substance of the land" are "akin to contracts" and do not have to be compensated under the consequential loss doctrine. *Id.* at 547-48. We respectfully submit that this distinction is artificial and arbitrary.

Rather than limiting the definition of property as did the Fifth Circuit to what physically inheres in the land, this Court has held that property "denote[s] the group of rights inhering in the citizen's relation to the physical thing" and addresses "*every sort of interest* the citizen may possess." *See Gen. Motors*, 323 U.S. at 377-78 (emphasis added). This Court explicitly rejected the notion that property refers merely to a

"physical thing with respect to which the citizen exercises rights recognized by law." *Id*. at 378; *see also*, *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) ("[T]he Constitution . . . requires that an owner of property taken should be paid for what is taken from him. *It deals with persons, not with tracts of lands*.") (emphasis added).

Although the Fifth Amendment does not require compensation for consequential losses, the government must compensate for the loss to an owner's *entire* property when it takes a portion of it. *United States v. Miller*, 317 U.S. at 376 ("If only a portion of a single tract is taken the owner's compensation for that taking includes *any element of value* arising out of the relation of the part taken to the entire tract.") (emphasis added); *see also United States v. Dickinson*, 331 U.S. 745, 750 (1947); *United States v. Grizzard*, 219 U.S. 180, 184 (1911) (if the government's taking "has depreciated the usefulness and value of the remainder [of plaintiff's land], the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains."); *Bauman v. Ross*, 167 U.S. 548, 574 (1897) ("[W]hen part only of a parcel of land is taken . . .[and] the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.").

The Fifth Circuit's conclusion is particularly anomalous in light of its recognition that MCTA's right to collect assessments "is an affirmative real covenant" because "the Declarations provide that landowners in Mariner's Cove must pay assessment fees, which MCTA is entitled to collect . . . [and] [t]hese assessments enable MCTA to maintain Mariner's Cove." 705 F.3d at 548. That description, we submit, demonstrates that, even in the panel's narrow view, the assessments and MCTA's entitlement to them, is "directly connected" to the land. *Id*. at 550-51

This Court's definition of property and its analysis of the effect of taking only a portion of property indicates that the Fifth Amendment requires compensation for taking of real covenants because such covenants are an "interest the citizen may possess" in the property and which, when taken by condemnation of parts of a unitary residential community, causes harm to the whole community. *Gen. Motors*, 323 U.S. at 378; *Miller*, 317 U.S. at 376. Thus, real covenants should be compensated because "just compensation" requires an owner of property to "be put in as good position pecuniarily as he would have occupied if his property had not been taken," and the taking of real covenants causes financial harm to the whole homeowner's association that must be compensated for the owners to be in as good of a pecuniary position as before the taking. *See Miller*, 317 U.S. at 373.

Indeed, this Court has recognized that entirely intangible property is protected under the Takings Clause. In *Ruckelshaus v. Monsanto*, *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984) the Court held that trade secrets were "property" under the Takings Clause. The Court noted that other types of intangible property had been recognized as compensable property interests under takings law, including materialmen's liens and real estate liens. 467 U.S. at 1003. There is, we submit, no principled distinction between homeowners assessments, provided for in a covenant that "runs with the land," and the types of liens described in *Ruckelshaus*.

This term, in *Koontz v. St. Johns River Water Management District*, the Court recognized that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Koontz*, 133 S.Ct. 2586, slip, op. at 15 (June 25, 2013). The Court found that the exaction of money – fees – is "functionally equivalent to other types of land use exactions." *Id*. Just as "the government must pay just compensation when it takes a lien – a right to receive money that is secured by a particular piece of property," and just as the right to receive income from land is a protected interest in real property under Florida law, *id*. at 16, the deprivation of homeowners association fees similarly "operate[s] upon. . . an identified property interest" that requires compensation. *Id*.

Here, as in *Koontz*, there is a "direct link" between the association fees claimed and specific parcels of land and the deprivation of the association fees amounts to "a *per se* taking similar to the taking of an easement or a lien," *Koontz*, *id*. at 18 (citations omitted).

C. The Fifth Circuit's Holding That Real Covenants That Run With the Land Are Not Compensable Is Not Supported By This Court's Precedents.

The Fifth Circuit held that only real covenants which are "directly connected to a tangible property right" require compensation. 705 F.3d at 550. The Fifth Circuit sought to distinguish the facts of this case from *Adaman*:

> It is inaccurate to view both [this case and *Adaman*] as merely involving an exchange of assessment fees for communal services. Whereas the assessment fees that MCTA collected were used to maintain communal structures (e.g., streets), the assessments collected by the water company not only were used to provide a service (irrigation at the lowest possible cost) but also enabled the landowners in the agricultural project to exercise the rights to the water underlying the project lands.

Id. (citation omitted).

In its analysis, the Fifth Circuit recognized the fundamental similarity of the types of restrictive

covenants, noting that they could be described as providing services for the communities through the same method.

Under this Court's precedents, property has been defined based on local law. *See, e.g., United States ex rel. Tenn. Valley Auth. v. Powelson,* 319 U.S. 266, 279 (1943), as the Fifth Circuit concedes, 750 F.3d at 544. Once property loses this foundation, there is, we submit, no principled way to determine what constitutes property for purposes of takings law.

If the Fifth Circuit decision stands, this case would set a dangerous precedent for allowing the term "property" to exclude certain forms of property, potentially leading other courts to exclude other parts of the "bundle of rights" from the term "property." Rather than allow courts to exercise their imagination in determining what property does not require compensation, this Court should grant certiorari to affirm that the Fifth Amendment protects ***all*** property interests and that no subset of property rights is not protected from governmental takings.

II. THE ISSUE IS OF NATIONAL IMPORTANCE

The Fifth Circuit's decision in this case puts at risk the ability of homeowner association communities – often referred to as "Common Interest Developments" ("CIDs") – to thrive and even to continue to exist. It will certainly make it

difficult for such communities to fund building and maintenance of infrastructure and common services. The uncertainty about compensation for the homeowners association fees associated with condemned portions of such a community may significantly deter lenders from financing such communities because their investments in homeowner association developments are secured by liens on the communities' common infrastructure and on the revenue streams from fees and assessments.

A. The Prevalence of "Common Interest Developments"

CIDs such as the Mariner's Cove community are quite common and becoming more so. Upwards of 63 million Americans, or one-fifth of the population, now live in them. *See* Cmty. Ass'ns Inst., *Industry Data, National Statistics*, *available at* http://www.caionline.org/info/research/Pages/default.aspx (last visited July 12, 2013). That represents a 40% increase from 2000 to 2012. *Id*.

The attraction of CIDs is likely to accelerate as the retired population grows and more homeowners seek out communities featuring recreational amenities maintained by the homeowners association, such as golf courses, swimming pools, tennis courts, and clubhouses. *See* Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible*

Solutions, 73 St. John's L. Rev. 3, 7 (1999). CIDs may be "the most important property right development in the United States since the rise of the modern business corporation." *See* Robert H. Nelson, *The Rise of Private Neighborhood Associations: A Constitutional Revolution in Local Government*, *in* The Property Tax, Land Use and Land Use Regulation 210 (Dick Netzer ed., 2003).

B. Societal Benefits of Common Interest Developments

1. CIDs preserve open space by encouraging "clustering."

CIDs provide a way for builders to more easily cluster housing and preserve open space. Condominiums and cooperative housing developments offer developers the opportunity to build more units on smaller parcels of land. *See* Christopher Baum, *The Benefits of Alternate Dispute Resolution in Common Interest Development Disputes*, 84 St. John's L. Rev. 907, 911 (2010). "Cluster" housing provisions in local zoning codes often encourage building high density units while preserving undeveloped open space. *See* Tom Pierce, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability,* 19 U. Haw. L. Rev. 93, 105 n.72 (1997) (noting that cluster housing can help save large areas of undeveloped green space).

CIDs also facilitate controlled development of suburban and rural areas that do not have strict zoning ordinances in place. *See* John W. Fisher, *The Evolution of Restrictive Covenants in West Virginia*, 100 W. Va. L. Rev. 55, 56 (1977). Equally significant, CIDs promote land use restrictions on a consensual basis and allow for adaptation to local needs without the heavy hand of the regulatory state.

Rising land and housing prices have led to a growing demand for higher density occupancy. Building developments with higher densities leads to significant economies in the use of land, including the provision of parks, green spaces, and common facilities for the whole neighborhood. *See* Robert H. Nelson, *supra* at 229; *see also* Evan McKenzie, Privatopia: Homeowner Associations and the Rise of Residential Private Government 85 (1994).

The rise of CIDs coincides with the growth of the environmental movement in the United States. Nelson, *supra*, at 235-36. Neighborhood association rules often limit the manner of use of individual properties, and "neighborhood environmentalism" improves and protects the quality of the immediate surrounding environment. *Id*. In addition to homeowners' association rules, conservation easements (which function as restrictive covenants) are often part of the approval process for cluster developments and can be vitally important in facilitating

conservation efforts. *See* Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation,* 41 U.C. Davis L. Rev. 1897, 1905 (2008).

2. CIDs provide services in place of over-burdened local governments.

CIDs often bear the cost of infrastructure that budget-constrained local governments cannot afford, such as road, sidewalk, traffic control systems, water and sewage systems, and other utility construction and maintenance. *See* Christopher Baum, *supra*, at 911; *see also* Evan McKenzie, Beyond Privatopia: Rethinking Residential Government 3 (2011) ("The fiscal benefits to local governments [are] easy to see: these new homeowners [in CIDs] would be paying a full share of property taxes but would not receive many public services, creating a windfall for the public treasury.").

CIDs often provide increased security because many are gated and have private security personnel, thus reducing somewhat the need for town or county public safety personnel. *See* Baum, *supra*, at 910.

3. CIDs provide affordable housing for retirees and lower-income families.

CIDs often maintain common spaces and even individual units, and require less maintenance and upkeep by individual owners. This makes CIDs

desirable for senior citizen retirees. *See* Baum, *supra*, at 909.

CIDs are also a mechanism to provide publicly-sponsored housing for low-income populations, while encouraging individual ownership. *See* Patrick J. Rohan, *supra*, at 9; *see generally* Judith Bernstein-Baker, *Cooperative Conversion: Is it Only for the Wealthy? Proposals that Promote Affordable Cooperative Housing in Philadelphia,* 61 Temp. L. Rev. 393 (1988).

C. Homeowners Association Assessments or Fees Are Essential to Common Interest Developments.

All of the benefits of CIDs are based on arrangements for common facilities or services provided by the homeowners association, and these benefits need to be paid for. Almost universally, CIDs are financed by fees or assessments collected from the owners of individual units, paid into a common fund in the name of the homeowners association, and disbursed by the association or a management company retained by the association. Cal. Ass'n of Realtors, *A Basic Guide to Owning a Home in, and the Administration of, a Common Interest Development* at 10-11 (2010), *available at* http://www.car.org/media/pdf/legal/cid-brochure-2010/ (last visited July 14, 2013).

If a CID has invested substantially in essential infrastructure improvements, amenities, and essential services, a substantial reduction in its

annual revenue – because a number of units no longer pay fees or assessments – would either diminish the quality or quantity of the service provided or require the imposition of proportionately higher assessments or fees on the remaining units.

While a well-maintained CID can increase the value of an owner's property, *see* 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 July 14, 2013), an underfunded CID can reduce the value of an individual lot owner's home. *See* Joseph Aiu, *Consumer Warning: Underfunded Homeowners Associations*, California Department of Real Estate at 1 (2012), *available at* http://www.dre.ca.gov/files/pdf/ca/2012/ConsumerAlert_UnderfundedHOAs.pdf (last visited July 12, 2013:

> An underfunded budget may cause unexpected expenses for the owners living in a CID and/or have a deleterious affect on the value or condition of an owner's property. If the [homeowner association] cannot properly maintain the common areas due to budget constraints, roads, pools, exterior paint, and roofs may fall into disrepair . . . [homeowner associations] facing severely underfunded budgets often must resort to levying special

> assessments on the owners living within the CID in order to pay for needed repairs or maintenance.

Undermining the assessment base can directly lead to underfunded CIDs.

The Fifth Circuit's decision in this case puts at risk the ability of CIDs to finance their infrastructure, common services, and amenities. It may also reduce or eliminate the willingness of banks or other lenders to finance such communities because their investments in loans to developers of CIDs and homeowners associations are secured by the very infrastructure, physical amenities and revenue stream from fees and assessments that the Fifth Circuit's decision puts in jeopardy.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant the petition for a writ of certiorari.

July 15, 2013

Respectfully submitted,

Martin S. Kaufman
Counsel of Record
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org
Counsel for Amicus Curiae