No. S217738

In the Supreme Court of the State of California

PROPERTY RESERVE, INC. and
THE CAROLYN NICHOLS REVOCABLE LIVING TRUST, *et. al.*

Petitioners,

vs.

DEPARTMENT OF WATER RESOURCES,

Respondent.

After an Opinion by the Court of Appeal, Third Appellate District
(Case Nos. C067758, C067765, C0668469)
On Appeal from the Superior Court of San Joaquin County
(Case No. JCCP 4594, Honorable John P. Farrell, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE; BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Owners' Counsel of America (OCA) and the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) (Proposed Amici) jointly seek leave to file the accompanying amici curiae brief in support of the property owners/Petitioners. Proposed Amici believe their brief will assist the Court in determining (1) any substantial physical intrusion onto private property is a taking triggering California's constitutionally-mandated eminent domain protections, and (2) contrary to the State's hyperbole, reaffirming this principle—first enunciated by this court nearly a century ago in *Jacobsen v. Superior Court of Sonoma Cnty*. (1923) 192 Cal. 319—will not result in the sky falling or public infrastructure projects grinding to a halt. The questions presented require the Court to consider fundamental principles applicable in all eminent domain cases. As such, the issues are of concern to all California property owners. Amici believe their experience and national perspectives will aid this Court in its determination of the issues.

I. Interest of Owners' Counsel of America

OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance the law, and preserve and defend

the rights of private property owners. In doing so, OCA furthers the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. (*See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998)) As the lawyers on the front line of property law and property rights, OCA members understand the importance of the issues in this case because affirming the Court of Appeal ensures that when the government takes property, it scrupulously fulfills its constitutional obligations to pay just compensation and follows eminent domain procedures.

OCA frequently files amicus briefs in eminent domain, land use, and regulatory takings cases in both federal and state courts, and OCA members and their firms have been counsel for a party or amicus curiae in many of the landmark property cases the courts have considered in the past forty years, including several of the cases which are relevant to this Court's decision here. (*See, e.g.*, *Koontz v. St. Johns River Water Mgmt Dist*. (2013) 133 S. Ct. 2586; *Arkansas Game and Fish Comm'n v. United States* (2012) 133 S. Ct. 511; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection* (2010) 130 S. Ct. 2592; *Winter v. Natural Resources Def. Council* (2008) 555 U.S. 7; *Kelo v. City of New London* (2005) 545 U.S. 469; *San Remo Hotel, L.P. v. City and Cnty. of San Francisco* (2005) 545 U.S. 323; *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606; *City of Monterey v. Del Monte*

Dunes at Monterey, Ltd. (1999) 526 U.S. 687; *Dolan v. City of Tigard* (1994) 512 U.S. 374; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003; *Yee v. City of Escondido* (1992) 503 U.S. 519; *Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825); *First English Evangelical Lutheran Church v. Los Angeles Cnty.* (1987) 482 U.S. 304; *Agins v. City of Tiburon* (1980) 447 U.S. 255; *Kaiser Aetna v. United States* (1979) 444 U.S. 164.)

OCA members have also authored and edited treatises, books, and law review articles on eminent domain, property law, and property rights. (*See, e.g.*, Michael M. Berger, *Taking Sides on Takings Issues* (Am. Bar Ass'n 2002) [chapter on *What's "Normal" About Planning Delay?*?]; Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings* (2000) 3 Wash. U.J.L. & Policy 99; Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property* (1986) 9 Loy. L.A.L. Rev. 685; William G. Blake, *The Law of Eminent Domain—A Fifty State Survey* (Am. Bar Ass'n 2012) [editor]; Leslie A. Fields, *Colorado Eminent Domain Practice* (2008); John Hamilton, *Kansas Real Estate Practice And Procedure Handbook* (2009) [chapter on *Eminent Domain Practice and Procedure*]; John Hamilton & David M. Rapp, *Law and Procedure of Eminent Domain in the 50 States* (Am. Bar Ass'n 2010) [Kansas chapter]; Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of* Penn Central Transportation Co. v. City of New York (2005) 13 Wm. & Mary Bill of Rts. J. 679; Dwight H. Merriam, *Eminent Domain Use and*

Abuse: Kelo *in Context* (Am. Bar Ass'n 2006) [coeditor]; Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"* (2011) 4 Alb. Gov't L. Rev. 154; Randall A. Smith, *Eminent Domain After* Kelo *and Katrina* (2006) 53 La. Bar J. 363)

II. Interest of NFIB Legal Center

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small business association representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide—including approximately 23,000 in California. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact the small business community. NFIB Legal Center has par-

ticular expertise in the area of property rights, and is actively working to defend private property rights throughout the country through amicus filings. (*See e.g.*, *Arkansas Game & Fish Comm. v. United States* (2012) 133 S.Ct. 511 [rejecting the argument that government can evade takings liability by limiting the duration of a government-induced flood]; *Koontz v. St. Johns River Mgmt. Dist.* (2013) 133 S.Ct. 2586 (2013) [holding that the nexus and rough proportionality tests apply to monetary exactions, and that government cannot evade takings liability by denying a permit where a landowner refuses to waive constitutionally protected rights]; *White Trust v. City of Elk River* (Minn. 2013) 840 N.W.2d 43 [holding that acceptance of a conditional use permit does not constitute waiver of constitutionally protected grandfather rights]) NFIB Legal Center is especially concerned with protecting small business interests in eminent domain proceedings because small business owners invest substantial personal assets into acquisition of real property in the furtherance of their entrepreneurial enterprises. (*See e.g.*, *Ilagan v. Ungacta* (2013) U.S. S. Ct., No. 12-723 [challenging the constitutionality of a taking that transferred title from a small business owner to a politically connected family]; *City of Perris v. Stamper* (Cal. 2014) No. S213468 [arguing the project influence rule prevents a condemning authority from devaluing a property on the theory that the highest and best use would require dedication of the very land the authority seeks to obtain]; *Main Street LLC v. City of Hackensack* (N.J. 2013) No. 072699 [defending the constitutional principle that a blight designation must be based on more than un-

substantiated assertions]; *Texas v. Clear Channel* (Tex. 2014) No. 13-0053 [arguing that just compensation must be measured by the free market value of a property, as opposed to its raw materials]; *Taylor v. Westerville* (Oh. App. 2014) 2014 WL 3936756 [holding that government must pay just compensation for an asserted landscaping easement])

Given the issues in this case, OCA and NFIB Legal Center seek to appear as amici curiae to ensure that when California property owners are faced with the power of the state exercising its eminent domain authority, those owners have the full protections of the U.S. and California constitutions behind them. Amici are specifically interested in this case because its resolution will impact every property owner in future eminent domain cases.

Counsel for OCA and NFIB Legal Center have examined the briefs on file in this case and are familiar with the issues involved and the scope of their presentation and do not seek to duplicate that briefing. Proposed Amici confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no party other than Proposed Amici and their counsel, made any contribution of any kind to assist in the preparation of this brief or made any monetary contribution to fund the preparation of this brief.

Accordingly, Proposed Amici OCA and NFIB Legal Center respectfully request this Court accept the accompanying Amici Curiae brief for filing in this matter.

Dated: March 19, 2015.

Respectfully submitted,

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INTRODUCTION

Nearly a century ago, this Court confirmed that a government entry onto private property which goes beyond "innocuous" and "superficial"—even if made under color of the entry statute—is a taking for which an owner is entitled to the full protections of California's eminent domain process. (*Jacobsen v. Superior Court of Sonoma Cnty*. (1923) 192 Cal. 319) Since that time, California's courts have reaffirmed that not every encroachment under the entry statute is privileged, and have avoided adopting the *per se* rule now advocated by the Department of Water Resources (DWR), that the mere invocation of the statute strips property owners of their eminent domain rights. When the government seeks more—as it did so here in its request to conduct the environmental and geological activities—it is a taking.[1]

Amici Owners' Counsel of America (OCA) and National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submit this brief to urge this Court to reconfirm (1) any substantial physical intrusion onto private property is a taking triggering constitutional eminent domain protections, and (2) contrary to the State's hyperbole, reaffirming this principle—first enunciated by this court in *Jacobsen*—

[1] Pursuant to this Court's Rule 8.520(f)(4), counsel states this brief was authored by counsel for amici identified on the cover, and was not authored in any part by counsel for either party, and no person or entity other than amici made a monetary contribution intended to fund the preparation or submission of this brief.

will not result in public infrastructure projects grinding to a halt.

QUESTIONS PRESENTED

1. Do the geological testing activities proposed by the Department of Water Resources constitute a taking?

2. Do the environmental testing activities set forth in the February 22, 2011 entry order constitute a taking?

3. If so, do the precondemnation entry statutes (Code Civ. Proc., §§ 1245.010-1245.060) provide a constitutionally valid eminent domain proceeding for the taking?

STATEMENT OF INTERESTS OF AMICI

Amici incorporate by reference their statements of interest in the accompanying Application for Leave to File Amici Curiae Brief.

STATEMENT OF THE CASE

Amici adopt the Statements of the Case in the Answer Briefs on the Merits.

SUMMARY OF THE ARGUMENT

The short answers to the Questions Presented are yes, the geological activities proposed by DWR and the environmental testing activities allowed by the Superior Court's order are both takings; and no, the procedures in the entry statutes fall well short of constitutional protections and the requirements of the

eminent domain statutes. This brief makes two points. *First*, any non-trivial physical invasion of private property is a *per se* taking requiring just compensation and adherence to eminent domain procedures. The intrusions sought by DWR and ordered by the Superior Court cannot be dismissed as mere "entries." This is not only a long-standing tenet of California constitutional law (*see Jacobsen, supra,* 192 Cal. at 329), it is a baseline Fifth Amendment principle, and thus a federal floor below which state law may not fall. *Second*, DWR exaggerates the impact of this Court reaffirming the *Jacobsen* rule. DWR seeks unchecked and expanded powers to invade and occupy private property on an on-going basis, and to make lasting physical imprints on the land, beyond the reach of constitutionally mandated condemnation and just compensation protections. It is no answer for DWR to argue that the gears of government will grind to a halt should this Court affirm bedrock constitutional principles; the sky will not fall if this Court continues to require what the Constitution demands.

ARGUMENT

I. ANY NON-TRIVIAL PHYSICAL INVASION IS A TAKING

A. To Remain Valid, California's Entry Statutes Must Be Interpreted Consistent With Constitutional Protections For Property Owners

The Court of Appeal, recognizing the DWR had sought much more than mere "entry" and had admitted its activities

were not superficial or innocuous, concluded that the scope and extent of these activities substantially interfered with petitioners' fundamental property rights, and were takings:

> The starting point of our analysis is *Jacobsen*, *supra*, 192 Cal. 319. Despite its age, *Jacobsen*'s holding applies today: a condemnor may not engage in precondemnation activities that will work a taking or damaging unless it first files a *condemnation suit* that provides the affected landowner all constitutional rights against the state's exercise of eminent domain.

(Opinion at 17 [emphasis original]) (*See also Cnty. of Kane v. Elmhurst Nat'l Bank* (Ill. App. 1982) 443 N.E.2d 1149, 1154 ["Similarly the part of the order authorizing soil borings and a geologic study without the landowners' consent or a prior condemnation proceeding would be invalid even if statutorily authorized. Such drilling and excavation, even where subsequent backfilling has been required, has been properly recognized as a substantial interference with the landowners' property rights rather than a minimally intrusive preliminary survey causing only incidental damage."] [citing *Jacobsen v. Superior Court of Sonoma Cnty*. (1923) 192 Cal. 319; *Cnty. of San Luis Obispo v. Ranchita Cattle Co.* (1971) 16 Cal. App. 3d 383; *Mackie v. Mayor and Com'rs of Town of Elkton* (Md. 1972) 290 A.2d 500])

California's entry statutes (Code of Civil Procedure 1245.010, *et seq*.) are just that: a statutory scheme which an agency with the power of eminent domain may invoke only to make "innocuous entry and superficial examination" of property to determine whether it should be condemned:

> But however this may be, it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property.

(*Jacobsen*, *supra,* 192 Cal. at 329) Contrary to the teachings of that case, however, the DWR attempted to bend the entry statutes beyond their breaking point, seeking approval for activities and uses that by no stretch of the imagination could be called "innocuous" or "superficial," and the Court of Appeal rightly rejected it.

Jacobsen was a constitutional ruling, and its reasoning was not—and could not be—abrogated or superseded by the statute's subsequent amendment to allow greater intrusion. (*Id.* ["Any other interpretation would, as we have seen, render the section void as violative of the foregoing provisions of both the state and the federal constitution.']). The Court of Appeal followed *Jacobsen* and correctly construed the entry statutes narrowly, thereby avoiding the constitutional defect that arises only if DWR's expansive reading of the statute is accepted. (*See Jacobsen*, *supra,* 192 Cal. at 329 ["To give to the foregoing section of the code the interpretation which the respondents would have us place upon it would be to render it clearly violative of the constitutional provisions above referred to under the authorities above cited construing the same"])

In short, this is an *entry* statute, not a shortcut to take property without following the constitution.

B. As A Matter Of Federal Law, DWR's Activities Are Takings

There can be little doubt that the DWR's environmental and geological activities in this case qualify as takings, and not merely innocuous or superficial entries. The Court of Appeal's conclusion was driven both by California and federal constitutional law. (*See Lingle v. Chevron U.S.A., Inc*. (2005) 544 U.S. 528 ["The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."]) California law, of course, may provide more protections to property owners than does the Fifth Amendment. (*See*, *e.g.,* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota (2008) 102 Northwestern L. Rev. 365 ["Few doubt that states can provide greater protection for individual rights under state constitutions than is available under the Supreme Court's interpretation of the Federal Constitution."]) But while a state may provide greater protections, it cannot recognize less. Thus, the federal rule, developed by the United States Supreme Court in a line of cases stretching back to at least the 19th Century, compels the conclusion that the DWR's activities on, and uses of, petitioners' properties was a taking. (*See*, *e.g*., *Pumpelly v. Green Bay & Mississippi Canal Co*. (1871) 80 U.S. 166, 181 ["where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any

artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."]; *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 180 ["This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."]; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 427 n.5 [citing Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L. Rev. 1165, 1184 ["The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."]]) This authority, standing alone, was sufficient to trigger the requirement that DWR condemn petitioners' properties if it wanted to make such an extensive use of them.

These decisions also make clear that it does not take much for a physical intrusion to be deemed a taking under the

Fifth Amendment.[2] In an area of law in which the U.S. Supreme Court generally eschews bright-line rules (*see Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 636 ["The temptation to adopt what amount to *per se* rules in either direction must be resisted."]), two categories of government actions nonetheless result in *per se* liability under the Takings Clause, without regard to the economic impact on the owner, or the public interest in the action.

First, a taking occurs when the effect of the government action is to deprive property of its economically beneficial uses. (*See Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015) Second, a *per se* taking also occurs when the government has "compel[led] the property owner to suffer a physical 'invasion' of his property[.]"(*Id.* [citing *Kaiser Aetna v. Unit-*

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[2] Of course, the compensation owed for a temporary taking necessarily depends upon the length and extent of the occupation. The measure of compensation would be determined by the fair market rental value of the property through the duration of the occupation, plus the full and perfect equivalent of any damages resulting from the invasion. (*Yuba Natural Resources, Inc. v. United States* (Fed. Cir. 1990) 904 F.2d 1577, 1581) Thus, for truly fleeting invasions or intermittent invasions, the compensation award may primarily reflect the degree of damage caused. By contrast, where the occupation is drawn out over a longer time—but without inflicting lasting physical damages to the property—the award would primarily reflect the fair market rental value of the parcel. Either way, government can minimize compensation awards by acting efficiently—occupying the land no longer, and causing no more damage, than truly necessary to advance the public's goals. As elaborated *infra* in Section II, this promotes socially desirable results in encouraging efficient condemnation activities while minimizing the burdens imposed on individual property owners, the very purpose of eminent domain's protections. (*Armstrong v. United States* (1960) 364 U.S. 40, 49 [explaining that the Takings Clause was designed to enable government to carry out public projects, but also to prevent 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."])

ed States (1979) 444 U.S. 164 [imposition of navigational servitude on private waterway would be a taking of the right to exclude]; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 [requirement that property owner allow installation of small cable TV box a taking]; *United States v. Causby* (1946) 328 U.S. 256, 265 & n.10 [invasion of airspace]; *Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825 [exaction of public access easement as a condition of development approvals]) While recognizing that invasions assumed to be permanent do not require a case-specific inquiry into the public interest supporting the action and do not require a physically large intrusion (*see Lucas*, 505 U.S. at 1015 [permanent "minute" intrusions require compensation), the Supreme Court has never fixated on an artificial distinction between "permanent" and "temporary" invasions to determine liability, much less adopted a bright-line rule that invasions deemed "permanent" are takings, while those deemed "temporary" are not. Instead, the Court has applied the rule that any direct and substantial occupation of private property is a taking, and requires compensation even if temporary. (*See Arkansas Game and Fish Comm'n v. United States* (2012) 133 S. Ct. 511)

Nor are invasions which can be characterized as less-than-permanent subject to a different test. Because there is no question that the DWR's activities resulted in a physical invasion of the petitioners' land, the tests established by the Supreme Court's line of physical invasion cases govern, not the "*ad hoc*" regulatory takings test set out by the Court in the *Penn*

Central case. (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104) In that case, the Court recognized the distinction between a regulatory taking—where a property owner claims that the application of a police power regulation to her property has such an impact on her rights that it is the functional equivalent of an exercise of eminent domain—and the situation where, as here, land is actually appropriated or used by the public pursuant to the eminent domain power. (*See id*. at 124 ["A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."]) In *Lingle v. Chevron U.S.A., Inc*. (2005) 544 U.S. 528, the Court reaffirmed this clear distinction, emphasizing:

> The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. Beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, however, the Court recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster. Regulatory actions generally will be deemed per se takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property, or (2) where regulations completely deprive an owner of " all economically beneficial us[e]" of her property. Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631.

(*Lingle, supra*, 544 U.S. at 528-29 [some citations omitted])

Nor does *dicta* from *Arkansas Game and Fish* dictate a different result. There, the only issue the Court decided was that a temporary invasion could be as much of a taking as a permanent one: "[w]e rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." (*Arkansas Game and Fish Comm'n*, *supra*, 133 S. Ct. at 522) The Court did not establish a different standard for physical invasions that may be less than permanent. (Brian T. Hodges, *Will* Arkansas Game & Fish Commission v. United States *Provide a Permanent Fix for Temporary Takings?* (2014) 41 B.C. Envtl. Aff. L. Rev. 365, 385 ["There is real danger that the Supreme Court's overview in *Arkansas Game & Fish Commission v. United States* of various takings tests in which questions of duration may be relevant will be read as establishing a new, multi-factor test applicable to temporary physical takings."])

This court should reject the DWR's invitation to conflate the *ad hoc* multi-factor *Penn Central* balancing test—which applies only in regulatory takings cases—with the bright-line *per se* rules set forth in the Supreme Court's physical takings doctrine. "Subjecting a physical invasion to a multi-factor, hybrid regulatory/physical takings test would represent a sea change in takings law." (Hodges, *supra*, 41 B.C. Envtl. Aff. L. Rev. at 387) As the Supreme Court noted in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 322-

23, there is a "longstanding distinction" between physical takings and regulatory takings, which "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."

Importantly, *Tahoe-Sierra* confirms a doctrinal basis for compartmentalizing these different tests. Whereas the regulatory takings doctrine looks to the "parcel as a whole" in weighing whether a regulatory burden amounts to a taking, the physical takings doctrine rejects that approach in lieu of *per se* rules. (*Tahoe-Sierra*, 535 U.S. at 303) *Tahoe-Sierra* recognized this distinction as crucial when grappling with the question of when a temporary government action constitutes a taking.

In *Tahoe-Sierra* the U.S. Supreme Court considered whether a 32-month regulatory moratorium on construction amounted to a *per se* taking under *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003. The property owners argued that the *Lucas per se* test should apply because they had been completely deprived of the right to make any economic use of the property during the time of the moratorium. The Court rejected that argument, and explained that the regulatory takings test looks to the impact of a restriction on the "parcel as a whole", so as to prevent property owners from expediently "defining the property interest taken in terms of the very regulation being challenged." (*Tahoe-Sierra*, *supra*, 535 U.S. at 331) As such, the Court held that it is inappropriate to look at only a limited temporal segment of a property when considering

whether a regulation has deprived the property owner of all economically beneficial uses. (*Id.* at 303) For that reason, temporary regulatory takings claims are relegated to review under the *Penn Central* balancing test.

Conversely there is no basis for resorting to a balancing test when a temporal segment of property has been physically occupied. A balancing analysis is necessary in the context of regulatory a takings case because the actual impact of an abstract regulatory restriction can only be understood in view of what uses are allowed over the course of the property's full life. By contrast, in physical takings cases the extent of the invasion and the actual burden imposed are concrete and readily apparent; therefore, there is no need to balance the economic impact of a physical occupation against the value retained by the parcel as a whole. (*Tahoe-Sierra*, *supra*, 535 U.S. at 324) Moreover, without employing the parcel as a whole rule, there is simply no basis for saying that a physical occupation must be of a requisite magnitude—in terms of either space or time—to trigger the duty to pay just compensation. Accordingly, takings liability necessarily arises whenever there is a substantial physical intrusion into private property.

In this case, the "environmental activities" ordered by the Superior Court "would require entry for a total of 60 intermittent 24-hour days spread over a period of two years for each of the parcels." (*see* Opinion at 6-7) However permanent or not those invasions may have been, they go well beyond the innocuous and superficial. And DWR's proposed "geological activities"

described by the Court of Appeal are even more plainly *Loretto* takings. (*See* Opinion at 7 [inserting a "one-half-inch diameter rod into the ground up to a depth of 200 feet," and "boring into the ground up to a depth of 205 feet, creating a hole roughly six inches in diameter, and removing soil cores and samples for review and testing. The holes created by both types of tests would be filled with a permanent cement/bentonite grout."])

C. Other States View Entry Statutes Similarly

The approach of the Kansas Supreme Court is illustrative of the way other states interpret similar entry statutes. In *National Compressed Steel Corp. v. Unified Gov't of Wyandotte Cnty./Kansas City*, that court concluded—similar to *Jacobsen*—that the Kansas entry statute, Kan. Stat. Ann. § 26-512, which allows a prospective condemnor to "enter upon the land and make examinations, surveys and maps," did not permit a physical invasion. (*National Compressed Steel Corp. v. Unified Gov't of Wyandotte Cnty./Kansas City* (Kan. 2002) 38 P.3d 723, 735) The list of environmental and geological activities which the government sought to undertake in that case was long, but not as extensive as those which the DWR sought here, and included drilling soil borings, creating temporary monitoring wells, installing pipes, inserting sand, collecting soil and water samples, purging wells, and filling of drilled holes. (*Id.* at 727) In rejecting the government's argument that these activities fell within the statute's permitted uses, the court concluded that "subsoil testing is beyond the scope of the examination authorized." (*Id.*

at 735) The court also held that the power of eminent domain must be strictly construed, and surveyed how the courts of other jurisdictions analyzed the issue, noting that courts in Indiana, Illinois, Missouri, and Nebraska, also viewed their entry statutes similarly. (*See Indiana State Highway Comm'n v. Ziliak* (Ind. App. 1981) 428 N.E.2d 275, 297 [the term "survey" did not allow digging a 50-foot long and 6-foot wide trench on the property]; *Cnty. of Kane v. Elmhurst Nat'l Bank* (Ill. App. 1982) 443 N.E.2d 1149, 1154 ["Rather than hold that such drilling and surveying is authorized under a statute which we would then have to invalidate, we decline to read the power to make the contemplated soil and geologic survey into Section 5-803's grant of power to "mak[e] surveys."]; *Missouri Highway & Transp. Comm'n v. Eilers* (Mo. App. 1987) 729 S.W.2d 471, 474 [soil survey was a taking, and condemnor could not conduct the study until either the owner consented, or the condemnor initiated eminent domain proceedings to take an easement]; *Burlington Northern and Santa Fe Ry. Co. v. Chauk* (Neb. 2001) 631 N.W.2d 131, 139 [preliminary tests resulted in a taking]) Although the entry statutes at issue in those cases are not phrased in precisely the same way as California's, the courts in these cases made clear their rulings were not based only on interpreting the statutes, but were compelled as a matter of constitutional law. (*See*, *e.g.*, *National Compressed Steel Corp., supra*,. 38 P.3d at 732 ["Finally, statutes should be construed to avoid constitutional problems. As discussed in the next portion of this opinion, if [Kansas' entry statutes] are read to authorize

soil surveys, they will violate constitutional restrictions on the taking and damaging of private property without just compensation."] [citing *First National Bank of St. Joseph v. Buchanan Cnty.* (Mo. 1947) 205 S.W.2d 726, 730]) Thus, the courts recognized that the environmental and geological activities sought in those cases would be takings regardless of whether the statutes expressly authorized the activities or not.

Applying a similar approach, the entry statutes of other states place similar restrictions on a condemnor's entry, limiting those activities to insubstantial uses. (*See, e.g.*, Virginia Code Ann. § 25.1-203(A) [limiting precondemnation entry to "inspect the property"]; Virginia Code Ann. § 33.1-94 [highway department may enter land for certain enumerated activities "photographing, testing, including but not limited to soil borings or testing for contamination, making appraisals, and taking such actions as may be necessary or desirable to determine its suitability for highway and other transportation purposes"]; Md. Code § 12-111 [condemnor may enter "to make surveys, run lines or levels, or obtain information relating to the acquisition or future public use of the property . . . [s]et stakes, markers, monuments, or other suitable landmarks or reference points where necessary; and . . . [e]nter on any private land and perform any function necessary to appraise the property."]; Haw. Rev. Stat. §101-8 [authority to "enter upon the land and make examinations and surveys"]; N.J. Stat. Ann. § 20:3-16 ["purpose of making studies, surveys, tests, soundings, borings and appraisals"])

II. THE SKY HAS NOT FALLEN

Expedience and governmental convenience do not trump constitutional rights. This court has never been swayed by unsupported assertions that a ruling against government will make it too difficult for it to operate. For example, in *Endler v. Schutzbank* (1968) 68 Cal. 2d 162, 180, this court rejected an argument that its ruling would interfere with government's ability to function:

> The Attorney General finally urges that, whatever result principle and precedent might require, this court should not inconvenience the commissioner by recognizing the plaintiff's right to a hearing. This suggestion is, to say the least, surprising. Since the "right to . . . a hearing is one of 'the rudiments of fair play' . . . assured . . . by the Fourteenth Amendment. . . . (t)here can be no compromise on the footing of convenience or expediency . . . when that minimal requirement has been neglected or ignored."

(*Id*. [quoting *Ohio Bell Telephone Co. v. Public Utilities Comm'n* (1937) 301 U.S. 292, 304-05]) This principle also has been emphasized repeatedly by the Courts of Appeal. (*See Lantz v. Superior Court* (1994) 28 Cal. App. 4th 1839, 1855 ["Mere convenience of means or cost will not satisfy that test for that would make expediency and not the compelling interest the overriding value."]; *Wood v. Superior Court* (1985) 166 Cal. App. 3d 1138, 1148 [citing *Schneider v. State of New Jersey, Town of Irvington* (1939) 308 U.S. 147, 163]) Most recently, the Fourth Appellate Court emphasized that it would not yield to concerns over administrative expediency in rejecting a separation of powers argument, and in insisting that the remedy must lie with the leg-

islature. (*In re M.C.* (2011) 199 Cal. App. 4th 784, 815 ["The Agency and amicus CSAC argue that a court order under section 331 directing that a dependency petition be filed places a burden on executive branch resources in providing social services and in pursuing matters believed to lack merit. That argument is one that must be addressed to the Legislature."])

Similarly, the U.S. Supreme Court concluded in a recent takings case that these kind of arguments gain little traction. *In Marvin M. Brandt Revocable Trust v. United States* (2014) 134 S. Ct. 1257, the Court rejected, 8-1, the government's Chicken Little argument that adhering to the Fifth Amendment's requirements would cost the taxpayers hundreds of millions of dollars. The Court's rejection makes sense, for even if a taking were found, the Bill of Rights, and the California Constitution were crafted intentionally to chill the fervor of the government. Fidelity to these protections is more important than government's ability to operate free of constitutional restraints. As Justice William Brennan once wrote:

> Even if I were to concede a role for policy considerations, I am not so sure that they would militate against requiring payment of just compensation. Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. . . . Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. . . . After all, a policeman must know the Constitution, then why not a planner? In any event, one may

> wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners.

(*San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 661 n.26 [Brennan, J., dissenting]) This is true for other constitutional rights, and as the Supreme Court pointed out, a person's property rights should not be a "poor relation" to her other rights:

> 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 the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

(*Dolan v. City of Tigard* (1992) 512 U.S. 374, 383)

Justice Brennan's query in *San Diego Gas* is particularly applicable here. There is no reason to think that as an empirical matter, this project will grind to a halt should the Court reaffirm the bedrock constitutional principle that DWR must condemn and pay just compensation when its invasive activities are of such magnitude that they interfere with an owner's property rights, or, for that matter, that the State will stop other infrastructure projects or invoking the power of eminent domain—and paying just compensation—when necessary. Condemnors will scale back their exploratory activity requests to conform to what is allowed under the entry statutes, the Fifth Amendment, and California's Constitution as they have since *Jacobsen*; or, if they desire more extensive uses of private property than the entry statutes permit, they will adhere to the eminent domain process and condemn the property. At worst, com-

plying with eminent domain procedures might be inconvenient; but it certainly won't make DWR's mission impossible, as it asserts. Any inconveniences to DWR here were brought about by its own overreaching and seeking more than the entry statutes allowed, and not by any defect in the law.

Adhering to the eminent domain process is itself a public good. It makes condemnor agencies and the public ask the right questions: "do we need to undertake this level of invasion just to determine whether the property is suitable for our needs?," and "do the benefits of the project justify the true costs of taking this property?" It assures owners who are being involuntarily deprived of their property that it is being done for a good reason and with due respect for their interests. It also ensures that the constitutional principles are followed. It also guarantees that, in those few cases where it is necessary, a jury of the property owner's peers will determine the "full and perfect equivalent" for the property pressed into public service.

Finally, as a practical matter, it is unlikely that government infrastructure projects would be impacted in any serious way if this Court rejects the DWR's argument, because eminent domain cases settle, overwhelmingly. Curtis Berger and Patrick Rohan conducted a study in the early 1960s, which offers some insight here. Their study was one of the few empirical studies that assessed whether owners "received fair market value compensation when their property has been taken under eminent domain." (Thomas W. Mitchell, *et. al.*, *Forced Sale Risk: Class, Race, and the "Double Discount"* (2010) 37 Fla. St. U. L. Rev.

589, 632-33) They observed, "settlement agreements were reached in more than 85% of the closed parcels, and less than 10% of the parcels were tried." (Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation* (1967) 67 Colum. L. Rev. 430, 440) This closely comports with data reported from the Georgia Department of Transportation in recent years. (Crystal Genteman, *Eminent Domain and Attorneys' Fees in Georgia: A Growing State's Need for A New Fee-Shifting Statute* (2011) 27 Ga. St. U. L. Rev. 829, 872 ["Of the 169 condemnations in 2000, 60 resulted in legal settlements and only eight went to jury trials. In 2005, 120 condemnations resulted in legal settlements with only 13 going to jury trials."]) There is no reason to doubt that the patterns observed in the 1960s, and studied in other jurisdictions, do not hold true today in California.

CONCLUSION

For these reasons, this Court should affirm the Court of Appeal.

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Respectfully submitted,

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