No. 14-864

In The
Supreme Court of the United States

HILLCREST PROPERTY, LLP,

Petitioner,

v.

PASCO COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

REASONS FOR GRANTING THE WRIT

I. THE COUNTY DOES NOT DISPUTE THE CORE REASONS FOR GRANTING THE WRIT.

Hillcrest's petition provides a strong basis for this Court's review of the Questions Presented. The County does not take issue with core points of the petition. It does not dispute that:

(1) an unconstitutional law is void *ab initio*, is a nullity, and does not exist;

(2) federal courts have a duty to deny effect to unconstitutional laws;

(3) any cause of action would only arise upon the government's attempt to enforce a law;

(4) once a law is enforced, the Constitution allows a facial attack on the law;

(5) the traditional justifications for statutes of limitations do not apply to attacks on unconstitutional laws;

(6) this Court has struck down ancient laws as facially unconstitutional without hesitation;

(7) whether state statutes of limitations can be applied to facial substantive due process claims is an important question that this Court has never decided; and

(8) if left standing, the Eleventh Circuit's decision will immunize unconstitutional laws from challenge by the mere passage of time

> and will encourage the proliferation of premature, unnecessary litigation.

Furthermore, the County does not take specific issue with Hillcrest's Statement of the Case – or even with Hillcrest's characterization of the extortionate facial content and operation of the Ordinance. The County simply notes without explanation that "there is considerable factual disagreement." BIO at 6.[1]

Ultimately, the County's opposition is simply that this Court has not squarely held that a state statute of limitations should not be applied to a facial substantive due process challenge. BIO at 14-16. But that gap in the law is precisely the reason this Court *should grant* review.[2]

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[1] The County points to various administrative remedies without explaining that they were found unconstitutional because they do "not assure just compensation"; improperly place "the whole of the burden and costs of proving the dedication . . . on the landowner"; and are likely "illusory." App. 18 n.2, 107, 108 n.31.

[2] Hillcrest does not object to amendment of its Questions Presented to reference the Fourteenth Amendment. There is no need to, though: both clauses provide the same protections, *Hurtado v. State*, 110 U.S. 516, 541 (1884), and the Fifth Amendment is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

II. THE ISSUES IN HILLCREST'S PETITION ARE PROPERLY RAISED.

The County argues that Hillcrest never raised 42 U.S.C. § 1988, the Continuing Violation Doctrine, or that there should be no statute of limitations for unconstitutional laws. The County's arguments are without merit.

The County first pressed the statute of limitations as an affirmative defense. In response, Hillcrest expressly raised the Continuing Violation Doctrine[3] and that the facial claim was not subject to a statute of limitations.[4] While Hillcrest did not expressly cite § 1988 below, any § 1983 statute of limitations question necessarily begins with § 1988. *See Wilson v. Garcia*, 471 U.S. 261, 267 (1985); App. 5, 38, 97 (citing to § 1988 cases). Even if these precise arguments were not raised below, this Court's practice permits a party to make any argument before this Court in support of a claim, as long as the claim was pressed or passed upon. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they

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[3] Hillcrest cited this Court's precedents. County App. 5 (citing *Lorance v. AT & T Tech., Inc.,* 490 U.S. 900, 913 n.5 (1989)); *id.* at 3; *see also* Doc. 173 at 2-3, 12.

[4] Hillcrest expressly argued that no statute of limitations can be applied to an unconstitutional law. County App. 2-3; *see also* Doc. 173 at 11.

made below." *Id.* (quoting *Yee v. Escondido,* 503 U.S. 519, 534 (1992)) (internal brackets and quotation marks omitted).

Here, the County pressed its statute of limitations defense, and the courts below passed upon the issue. Thus, before this Court, Hillcrest is free to make any argument in rebuttal to the County's statute of limitations defense.

III. THE COUNTY'S ARGUMENTS REINFORCE THE NEED FOR THIS COURT TO REVIEW THE QUESTIONS PRESENTED.

A. The County's Analysis of § 1988 Ignores the Primacy of Federal Law and Policy.

The County asserts that Hillcrest's § 1988 argument is "precedent shattering" because of this Court's practice of applying state statutes of limitations to § 1983 claims. BIO at 15. This argument fails for several reasons.

First, there is no precedent to shatter: this Court has never addressed the application of a statute of limitations to a *facial* § 1983 claim. Second, Hillcrest's analysis of § 1988 leaves intact this Court's existing § 1983 statute of limitations precedents (which did not involve facial challenges). Third, this Court has not hesitated to strike down facially unconstitutional statutes long after their enactment, suggesting that no statute of limitations should apply to facial constitutional challenges. Pet. 19-20. Last, this Court has consistently explained that § 1988 requires the

application of state statutes of limitations to civil rights claims to be tempered by the dictates of federal law and policy. *See Owens v. Okure*, 488 U.S. 235, 251 n.13 (1989).

The Third Circuit recently applied the analysis that Hillcrest suggests in *Tearpock-Martini v. Shickshinny*, 756 F.3d 232, 239 (3d Cir. 2014). In an Establishment Clause challenge, the Third Circuit held that "the significance of the constitutional interests at play, the minimal interests advanced by application of a limitations period, and the long-standing apparent exemption" of such claims from statute of limitations meant "it would be inconsistent with federal law or policy" to apply a statute of limitations to the claim. *Id.*

Similarly, it would be inconsistent with federal law and policy to apply a statute of limitations to Hillcrest's facial substantive due process challenge. Pet. 24-26.

B. The County has Not Refuted or Reconciled the Conflict Among the Courts of Appeals over Whether the Continuing Violation Doctrine Applies to Facial § 1983 Challenges.

The County makes several arguments against Hillcrest's invocation of the Continuing Violation Doctrine. None have merit.

The County argues that this Court should not grant the petition because the County could not find any of this Court's cases involving facial challenges

employing the term "continuing violation." However, the County does not dispute that this Court has adopted the doctrine. This underscores why this Court *should* grant the petition.

The County takes issue with Hillcrest's citation to *Franconia Associates v. U.S.*, 536 U.S. 129 (2002). That case involved the same "accrual upon enactment" argument adopted by the Eleventh Circuit, only applied to a contract claim statute of limitation. In rejecting that argument, this Court analyzed practical considerations that the Eleventh Circuit overlooked below. *See id.* at 146. Among its concerns was that "[p]utting prospective plaintiffs to the choice of either bringing suit" immediately or relinquishing claims forever "would surely proliferate litigation." *Id.* at 146-47.

The County points to a number of courts of appeals decisions rejecting or limiting the scope of the Continuing Violation Doctrine. These cases simply reinforce the conflict that Hillcrest pointed out, and which the County fails to reconcile. *See Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001); *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997); *Palmer v. Bd. of Educ.*, 46 F.3d 682, 683 (7th Cir. 1995); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd in part on other*

grounds sub nom. Wilder v. Va Hosp. Ass'n, 496 U.S. 498 (1990).[5]

Ignoring the conflict, the County moves directly to its merits arguments, but the very cases it cites underscore, rather than refute, why this Court should grant the petition. They confirm that where there is a longstanding, demonstrable, systemic, and overarching policy of unlawful conduct, the Continuing Violation Doctrine is applied to establish liability based on events occurring outside the limitations period. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-18 (2002); *Slorp v. Lerner, Sampson & Rothfus*s, 587 Fed. Appx. 249, 257 (6th Cir. 2014); *Selby v. Nat'l R.R. Passenger Corp.*, 191 F.3d 461, 461, 1999 WL 716836, at *3 (9th Cir. 1999); *LRL*

[5] There are also many examples of district courts applying the doctrine to facial § 1983 challenges. *See, e.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 767 (M.D. Tenn. 2014), *rev'd on other grounds sub nom. DeBoer v. Snyder*, 2014 WL 5748990 (6th Cir. 2014); *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 743 (W.D. Ky. 2012), *aff'd in part, rev'd in part on other grounds*, 739 F.3d 936 (6th Cir. 2014); *S. Lyme Prop. Owners Ass'n, Inc. v. Old Lyme*, 539 F. Supp. 2d 547, 557 (D. Conn. 2008); *Southold v. E. Hampton*, 406 F. Supp. 2d 227, 238 (E.D.N.Y. 2005), *aff'd in part, rev'd in part on other grounds,* 477 F.3d 38 (2d Cir. 2007); *Greene v. Blooming Grove*, 1988 WL 126877, at *4 (S.D.N.Y. 1988), *aff'd in part, rev'd in part on other grounds,* 879 F.2d 1061 (2d Cir. 1989).

Props. v. Portage Metro. Housing Auth., 55 F.3d 1097, 1105-06 (6th Cir. 1995).[6]

For example, in *Morgan*, this Court held that a hostile work environment was part of one overall unlawful practice. 536 U.S. at 117-18. For that reason, this Court held that, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for purposes of determining liability." *Id.* at 116-17.

The policies and practices codified in the Ordinance and the hostile land use regulatory regime they create are directly analogous. The enactment is but a component part of the enforcement of what the magistrate judge and the district court characterized as an overarching, systemic, unconstitutional policy and practice of extortionately leveraging the police power to obtain property the County would otherwise have to pay for. Specifically, the magistrate judge found that "the County has purposefully devised a land use scheme," and the district court found that the Ordinance's "manifest purpose" "is to evade the constitutional requirement for 'just compensation.'" App. 29, 68. Because the enactment of the Ordinance is part of an overall unlawful practice, the County should be liable under the Continuing Violation Doctrine for *all*

[6] To the extent the County relies upon facial takings cases, they are inapposite, since those takings are complete and fully effectuated upon enactment.

acts contributing to Hillcrest's claim, *including the enactment of the Ordinance*.

The Eleventh Circuit's decision improperly divorces the enactment of the Ordinance from the overarching unlawful policy and practice of extortionately leveraging the police power that the Ordinance codified. Thus, the Eleventh Circuit's decision conflicts with the precedent of this Court and other courts of appeals.

C. The County's Attempt to Distinguish Facial and As-Applied Challenges Conflicts with this Court's Holding in *Citizens United*.

The County argues that this Court should deny the petition because statutes of limitations have been applied to facial claims in some circumstances. That may be, but *this Court* has never done so, and it has never directly addressed either of the important statute of limitations Questions Presented by Hillcrest.

To the extent the courts of appeals have addressed the issue, this Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) casts serious doubt on whether these cases remain good law. In *Citizens United*, this Court concluded that the distinction between facial and as-applied challenges "is not so well-defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* at 331. Rather, "it goes to the breadth of the remedy employed by the Court,

not what must be plead in the complaint." *Id.* All nine justices agreed. *See id.* at 919 (Roberts, C.J., concurring); *id.* at 935 n.9 (Stevens, J., dissenting).

Consequently, a facial challenge is not a separate cause of action subject to a statute of limitations. Rather, a facial challenge requests a remedy that is available to a court if a timely-filed claim challenging the constitutionality of a law's enforcement is made. Here, it is undisputed that Hillcrest's as-applied claim seeking to enjoin enforcement of the Ordinance was timely filed. Therefore, the district court properly considered the facial validity of the Ordinance and, upon finding it facially unconstitutional, had the judicial duty to enjoin its enforcement, notwithstanding the date of the Ordinance's enactment.

Citizens United also explains why the County's attempt to distinguish Florida precedent holding there is no statute of limitations on void acts is unavailing. The County attempts to distinguish *Lake Worth Towers, Inc. v. Gerstung*, 262 So. 2d 1, 4 (Fla. 1972) on grounds that it involved an as-applied claim. Not only did *Gerstung* not make such a distinction, but *Citizens United* explains there is no principled basis for such a distinction. Void acts – those that are unauthorized or unconstitutional – are nullities, regardless of whether they are legislative or adjudicative in nature, and regardless of whether their invalidity is determined on an as-applied or facial basis.

Consequently, the County's and the Eleventh Circuit's distinction between facial and as-applied challenges

cannot be reconciled with *Citizens United*, making clarification by this Court appropriate and necessary.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR REVIEW.

A. Rather than Being a Reason for This Court to Deny Review, Hillcrest's Pending As-Applied Claim Makes This Case an Ideal Vehicle for Review.

Citing a number of cases indicating the availability of an alternative as-applied claim, the County argues that this Court's review is unnecessary, and characterizes Hillcrest's and the amici's concerns that the Eleventh Circuit's decision forever immunizes from challenge facially unconstitutional ordinance as "greatly exaggerated." BIO at 32.

The County's arguments indicate exactly why this Court should grant the petition. In *Citizens United*, this Court explained that, where the government "holds out the possibility of ruling" on a narrower, as-applied basis, "yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address" facial validity. 558 U.S. at 333. In fact, in the past, when faced with facially unconstitutional laws that "severely curtail[ ]" rights, this Court has held that relegating citizens to as-applied challenges would not be "proper" or "desirable." *See Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964) (rejecting dissent's suggestion to consider only as-applied claims).

Here, the County has carefully refrained from adopting a position on the merits of such an as-applied claim. This tactic only adds to the uncertainty associated with the substantial County-wide blighting effect caused by the Ordinance's extortionate leveraging of the police power. Because the facial invalidity of the Ordinance has been demonstrated by the district court, it is necessary "in the exercise of judicial responsibility" for this Court to determine whether such invalidity can be immunized from facial constitutional challenge by a state statute of limitations. *See Citizens United*, 558 U.S. at 334.

Moreover, this Court is not presented with questions related to unclear or disputed facts – it is presented with clean issues of important but unresolved law. Therefore, far from negating the need for this Court's review, Hillcrest's pending as-applied challenge ensures that this Court's holding will be appropriately limited to the application of statutes of limitation to facial claims.

B. This Case Illustrates the Lengths Local Governments Will Go to Evade This Court's Exactions Precedents.

This case is appropriate for review because the Ordinance and the County's enforcement of it illustrate the great lengths local governments will go to avoid this Court's exaction precedents. In adopting the Ordinance, the County brazenly sought to circumvent *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825

(1987) and *Dolan v. Tigard,* 512 U.S. 374 (1994). In enforcing the Ordinance, the County continues to demand property as a condition of development plan approval without regard to its need or the traffic impact of the proposed development. Supp. App. 1-2. Further, the County has now gone so far as to impose a general (that is, non-site-specific) condition of development approval purporting to require a developer to "waive[ ] any claims" that the County unconstitutionally conditioned the permit under *Nollan* and *Dolan*.[7]

If the Eleventh Circuit's decision stands, local governments will be able to continue to adopt and enforce ordinances designed to evade this Court's unconstitutional conditions doctrine by enacting such ordinances and not enforcing them until after a statute of limitations expires. The district court warned against immunizing just this sort of unconstitutional mischief, which already appears to be happening. *See, e.g.*, *Dibbs v. Hillsborough Cnty.*, 2014 WL 7067677, at *5 (M.D. Fla. 2014) (extending *Hillcrest* to cover all "facial attacks on land-use laws"); *see also* Amici Brief 7-14 (describing consequences).

[7] Board of County Commissioners Annotated Agenda (Feb. 24, 2015), *available at* http://pasco.siretechnologies.com/Sirepub/cache/2/zfbzgo5uwyrgbrqgtkq01k3p/11962370317201504424394 2.PDF [Item P14: click "Preliminary/Construction Site Plan and Stormwater – Att 1 – COA"]. *See* Condition 14; *see also*, Supp. App. 1, Condition 12.

CONCLUSION

Hillcrest's Questions Presented ask this Court to clarify one of the most fundamental aspects of constitutional adjudication: when courts may appropriately declare laws as facially unconstitutional. The County argues that state statutes of limitations can cutoff the duty of federal courts to do so, whereas Hillcrest argues that, as long as a federal court has a timely challenge before it, a federal court may properly employ the remedy of facial invalidation. Without this Court's intervention, the result of the Eleventh Circuit's adoption of the County's position will be exactly the wasteful, unproductive, and ever-increasing litigation that this Court has foreseen. *See Wilson*, 471 U.S. at 275. This Court should grant the petition.

DATED: April 1, 2015.

Respectfully submitted,

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MASTER PLANNED UNIT DEVELOPMENT
CONDITIONS OF APPROVAL
REZONING PETITION NO. 7079

* * *

Dedication of Right-of-Way

~~8.~~10. Street connections and rights-of-way to adjoining areas shall not be required.

~~9.~~11. Subject to the provisions of the LDC, Section 901.2.J. (Transportation-Corridor Management; Dedication-Rough Proportionality), the developer shall convey, at no cost to the County, the required amount of right-of-way to achieve a total of 235 feet of right-of-way for SR 52 (Pasco County Corridor Preservation Table as amended, located in the Comprehensive Plan, Transportation Element, for arterial/collector and major intersection right-of-way requirements).

In addition, the developer shall, at no cost to Pasco County, design, construct, provide, and obtain any and all permits required by any local, State, or Federal agency for appropriate and sufficient drainage/retention, wetland, and floodplain mitigation facilities on the developer's property or at another site acceptable to the County to mitigate all impacts associated with the initial and future planned (i.e., in the current County Comprehensive Plan Transportation Element or Metropolitan Planning Organization Long-Range Plan) improvements of SR 52 within or adjacent to the boundaries of the developer's property including, but not limited to, mitigation for initial and future lanes of

travel, shoulders, frontage roads, sidewalks, multimodal paths, medians, permanent slope easements (once grade of roadway is set) and other roadway appurtenances. The required drainage/ retention, wetland, and floodplain mitigation facilities shall be determined at the time of stormwater management plan review for the portion(s) of the project adjacent to SR 52, and this paragraph of this condition shall expire after such stormwate management plans have been approved, unless such facilities are required pursuant to a development agreement approved pursuant to the LDC, Section 406.3. All stormwater management plans, reports, or calculations for the developer's project shall include a detailed scope of design and permitting parameters and a signed and sealed certification that such plans, reports, or calculations comply with this condition.

~~10.~~12. To the extent that any of the conditions of this approval constitute monetary or property exactions that are subject to *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S 374 (1994), the applicant/owner, and successors and assigns (a), agrees that there is a nexus and rough proportionality between such conditions and the impacts of this project/development, and that such conditions are necessary to ensure compliance with the criteria of the LDC and Comprehensive Plan that are applicable to this approval, and (b) waives any claims based on such conditions. This agreement/waiver was entered into voluntarily, in good faith, for valuable consideration, and with an opportunity to consult legal

counsel, but does not affect the applicant/owner's ability to seek variances, administrative remedies, or modifications of the conditions of this approval through applicable processes in the LDC.

* * *