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 FOR THE CATO INSTITUTE, PROFESSORS RICHARD A. EPSTEIN, JAMES W. ELY, JR., ILYA SOMIN, AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that "the right to collect assessments, or real covenants generally," do not constitute compensable property under the Takings Clause.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. This case is important to Cato because it concerns the Constitution's basic protection of property rights.

Amici professors have written extensively on property law.

Richard A. Epstein has long specialized in real property and takings law.

James W. Ely, Jr. is the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University, where he specialized in property law.

Alex Tabarrok is Bartley J. Madden Chair in Economics at the Mercatus Center at George Mason University and professor of economics at George Mason University. He has written on the effect of

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

homeowner's associations on property values and widely in the area of law and economics.

Ilya Somin is Professor of Law at George Mason University School of Law, where he specializes in constitutional law and property law, particularly takings.

Donald J. Kochan is a professor of law at Chapman University School of Law, where he teaches and writes in areas including property, administrative law, natural resources law, and corporations.

Adam Mossoff is Professor of Law at George Mason University School of Law, specializing in property law and takings law.

SUMMARY OF THE ARGUMENT

The Fifth Circuit held that a community association's right to receive assessments from property owners—while admittedly a property right—was nevertheless not a *compensable* property right under the Takings Clause. By adopting the minority view in the split among the circuits and the States, the Fifth Circuit's holding undermines the growing practice by which more than sixty million Americans now share property rights through covenantal arrangements like those that were taken from the Mariner's Cove Townhomes Association.

Membership in a community association has, over the last 30 years, become a common feature of home ownership in the Nation. More and more citizens choose to enter into these property-rights-sharing arrangements because they provide substantial

benefits. They likewise benefit local governments, which increasingly rely on such associations to shoulder the responsibility for, and fiscal burden of, providing and maintaining infrastructure, utilities, and other services that are traditionally provided by the government. By shifting a greater burden for paying for such services to the remaining members of the association without compensation, the Government's taking here presents a textbook case of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ark. Game & Fish Com'n v. United States*, 568 U.S. ___, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Since the Fifth Circuit also acknowledged that its holding affected "real covenants generally," the decision threatens to undermine other covenantal arrangements, such as the increasingly popular use of conservation easements.

Finally, the Fifth Circuit's position conflicts with this Court's recognition in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. ___, ___ S. Ct. ____ (2013), that the right to receive income from property is a compensable property interest.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to provide uniformity to an increasingly common aspect of home ownership in the United States: membership in a community homeowners association. There is a significant inter-jurisdictional conflict as to whether the covenantal right to collect community association assessments—or real covenants in general—are

compensable property interests under the Takings Clause.

The petition should further be granted because the Fifth Circuit's decision conflicts with this Court's recognition in *Koontz* that an income stream secured by real property is a compensable property interest under the Fifth Amendment. 570 U.S. at ___, (slip op. at 16); *id.* at ___ (Kagan, J., dissenting) (slip op. at 7).

ARGUMENT

I. THIS CASE IS CRITICALLY IMPORTANT TO THE PRIVATE PROPERTY RIGHTS OF MORE THAN 60 MILLION AMERICANS WHO LIVE IN COMMUNITY ASSOCIATIONS

The very same sort of covenantal relations governing the 58 townhomes originally situated in the Mariner's Cove Townhomes Association affect a vast—and growing—number of homes throughout the Nation.

A. The Increasing Prevalence Of Covenantal Property Arrangements Like Community Associations Highlights The Importance Of Resolving The Split Of Authority.

Sharing property rights in community association arrangements is an increasingly common feature of home ownership in the United States.[2] The use of

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[2] These arrangements take a variety of forms, most prominently homeowners associations (*i.e.*, single-family homes), condominiums, and housing cooperatives. *See, e.g.*, ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 29-31 (2005). For the

such associations has exploded in recent years: In 1970, community associations represented about 1 percent of U.S. housing; by 2010, over 60 million Americans—approximately 20 percent of the population—lived in over 300,000 community associations throughout the Nation. Robert H. Nelson, *Community Associations at Middle Age: Considering the Options*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT FINANCE, 958, 958 (Robert D. Ebel & John E. Peterson eds., Oxford Univ. Press 2012); *see also* Community Associations Institute, *Facts and Figures About U.S. Community Associations* (2012) (hereinafter *CAI Facts and Figures*) http://www.caionline.org/info/research/Documents/industry_statistics.pdf (last visited July 7, 2013) (estimating that, as of 2012, more than 63 million people in 25 million homes live in community associations, which number in excess of 300,000).[3]

The number of citizens opting to live in community associations—and the extent of commerce affected by such arrangements—is sure to keep growing, as the majority of new housing built in the past three decades is subject to association arrangements. Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the*

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sake of clarity, we refer to these entities generically as "community associations."

[3] *See also* Foundation for Community Association Research, *Statistical Review 2012* 5 (2012) (showing growth of community associations from 1970 to the present).

United States, 38 URB. LAW. 859, 867 (2006) (hereninafter *Private Residential Communities*) ("In the largest metropolitan areas, more than 50 percent of new home sales are connected to a community association. Most new residential development in the fastest growing southern and western states is subject to governance by a community association."); Evan McKenzie, *Emerging Trends in State Regulation of Private Communities in the U.S.*, 66 GEOJOURNAL 89, 90 (2006) (hereinafter *Emerging Trends*) (observing that community associations are "the norm in new housing construction in most of the nation's major metropolitan areas."); *see also* Nelson, *Community Associations at Middle Age*, *supra*, at 958 (50% of housing built between 1980 and 2000 built within community associations); TRACY M. GORDON, PLANNED DEVELOPMENTS IN CALIFORNIA: PRIVATE COMMUNITIES AND PUBLIC LIFE 3 (2004) (60% of housing built in California during the 1990s subject to community association arrangements). In short, community associations are not confined to tony resort communities or Park Avenue condominiums.

The community association dues of more than sixty million Americans add up quickly. Community associations oversee huge expenditures of funds on behalf of their members. "In 2012, association boards supervised the collection of close to $40 billion in annual assessments and maintained investment accounts of more than $35 billion for the long-term maintenance and replacement of commonly held property." *CAI Facts and Figures*.

The split of authority described in the petition thus affects the private property rights of tens of millions of Americans across all segments of society. The need to resolve the split takes on added urgency

as more and more citizens opt for community association arrangements.

B. Allowing Uncompensated Takings Of Community Associations' Right To Collect Assessments Would Undermine The Great Benefits Of Such Associations And Permit The Exact Abuses The Takings Clause Was Designed To Forbid.

The explosive growth of community associations is no mere accident of modern history. Community associations provide a variety of private *and* public benefits, including increased property values, greater efficiency in the delivery of services, and lower costs to the public. *See, e.g.*, Ron Cheung, *The Interaction Between Public and Private Governments: An Empirical Analysis*, 63 J. URB. ECON. 885 (2008) (demonstrating correlation between increased incidence of community associations and reduction of local expenditures); Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 359-61 (2005) (observing that community associations provide extra value for homeowners through sharing resources, and that local governments gain fiscal flexibility through shifting costs to developers and associations); Amanda Agan & Alexander Tabarrok, *What Are Private Governments Worth?*, REGULATION, Fall 2005, at 14 (concluding that community associations have a positive effect on home values).

Cognizant of these benefits, local governments encourage the use of community associations in new developments, which allows the government to transfer costs from the general public to developers and community associations. *See Private Residential*

Communities, *supra*, at 886-98; Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1119-24 (2007). Associations then shoulder the burden to provide and maintain infrastructure, services, and utilities that are traditionally provided by the public. *See Private Residential Communities*, *supra*, at 886-87.[4]

The "Declaration of Servitudes, Conditions and Restrictions" of the Mariner's Cove Townhomes Association provides a classic case of transferring responsibility for traditionally public services to private parties through covenantal arrangements. *See* Pet. 52a (purposes of assessments include "repairs, replacement, maintenance and insurance of walkways and streets"), and 47-48a ("Expenses of Maintenance" defined as "common expenses including but not limited to, maintenance of all streets and pedestrian walkways within the project, lawn maintenance and landscaping, maintenance of

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[4] Professor French explains that:

> In common interest communities, the developer can transfer title to the streets and recreational facilities to the homeowners' association, require the association to manage and maintain the property, and require the owners to pay assessments to the association to cover its costs. By approving projects where the developer agrees to shift these responsibilities to homeowners, local government can escape the liability to maintain streets and parks or to provide other services that the homeowners can be made to provide for themselves.

French, *supra*, at 360-61 (footnote omitted).

water and sewer service, management costs, [and] reserves for capital improvements").

Community associations offer such benefits to local governments that developers are increasingly required to structure proposed housing developments as community associations as a condition of approval. *Private Residential Communities*, *supra*, at 886-98; *see also, e.g.*, Evan McKenzie, *Constructing The Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities*, 20 HOUS. STUD. 191, 194-96 (2005). As one scholar has explained:

> Cities use their power to approve or deny land development applications so as to seek maximum tax revenues at lowest cost in infrastructure creation and service provision. Common interest housing is a sort of "cash cow" for local government, offering new property tax payers who do not receive the same level of services as other residents. Cities now have a way to grow without building new infrastructure or providing services to more consumers. Instead, they require developers to build the infrastructure and pass the cost along to buyers, and arrange for the community association to provide services, paid for by owners' assessments. Yet, local governments collect a full share of property taxes from these new residents.

Emerging Trends, *supra*, at 91.

The decision by a local government to offload responsibility for—and the financial burden of—these services has been described as a "public service exaction." *Private Residential Communities*, *supra*, at 886-87; Franzese & Siegel, *supra*, at 1119-20.[5] The Court has previously ruled on the Takings Clause implications of physical exactions of property in connection with proposed developments. *Dolan v. Tigard*, 512 U.S. 374 (1994). Unlike one-time physical exactions (or upfront "impact fees"), through public service exactions, local governments require community associations to fund public service costs *in perpetuity*.

Whether required by the local government or not, however, a covenantal sharing of property rights to provide for the private delivery of public services achieves the same result, to the benefit of *both* the local government and the private property owners. This has important constitutional implications, as the Takings Clause is "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." *Ark. Game & Fish Com'n*, 133 S. Ct. at 518 (quoting *Armstrong*, 364 U.S. at 49).

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[5] Franzese and Siegel define a "public service exaction" as a "government policy aimed at load-shedding municipal functions" whereby "local governments, as a condition of land-use approval of new residential subdivisions, often require developers to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsibility of the municipality itself." *Franzese & Siegel*, *supra*, at 1119-20.

It would be a perverse result indeed to allow local governments to impose (or, if not to impose, to simply benefit from) the private delivery of public services for many years, decide later to *add* to the per-capita impact of providing such services by taking the means of paying for them, and not require the local government to at least compensate for the incremental burden. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973) (citation omitted). Saddling the remaining members of a community association with the increased cost of delivering public services is an unusually stark imposition of a "public burden" deserving of compensation.

II. THE SPLIT OVER COMPENSABILITY OF COVENANTAL RIGHTS IMPACTS PROPERTY BEYOND COMMUNITY ASSOCIATIONS

The issue presented in the petition is not limited solely to the right to collect assessments, but rather includes the question whether "real covenants generally" are compensable property under the Takings Clause. *United States v. 0.073 Acres of land*, 705 F.3d 540, 547 (5th Cir. 2013). The Fifth Circuit acknowledged that there is a significant split of authority as to whether restrictive covenants generally are compensable property interests, which reaches a host of entities that often own covenantal rights similar to those addressed in this case. *Id.* at 547-48; 2 NICHOLS ON EMINENT DOMAIN § 5.07[4], p. 5–366–72 (Julius L. Sackman, ed., 3d ed. 2012); Pet.

9-19; *see also*, *e.g., Leigh v. Vill. of Los Lunas*, 108 P.3d 525, 529-30 (N.M. 2004) (reviewing majority and minority views).

One analogous form of covenantal arrangement is the increasingly popular conservation easement:

> Conservation easements restrict the development and use of the land they encumber for the purpose of preserving the land's natural, open, scenic, historic, or ecological features. Landowners convey such easements to government entities or charitable conservation organizations (known as land trusts), and these entities and organizations hold and enforce the easements for the benefit of the public.

Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1899 (2008); *see also id.* at 1902-03 (noting the increased prevalence of conservation easements). Like community association governing documents, conservation easements reflect an agreement between private parties, and run with the land. *See id.* at 1900-02. Whether such easements are compensable remains unsettled. *See id.* at 1907-33 (reviewing split of authority and arguing that conservation easements constitute compensable property interests for eminent domain purposes); *see also* Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 641-52 (2006) (discussing how economic development

takings pose a particular threat to private land conservation).[6]

Consider an example: The Trust for Public Land pays $5 million to the owner of 50 acres of prime urban real estate to establish a green belt that will not be developed commercially, and the parties record a conservation easement setting out this covenantal relationship. A few years later, the Government takes 25 acres of the green belt to build a public works project (or to transfer the property to private developers as permitted by *Kelo v. City of New London*, 545 U.S. 469 (2005)).

It is difficult to fathom that, in this example, the Trust would not be compensated for the property interest it lost along with the taking. It paid money with the expectation that the land would not be developed.[7] *Cf. Ark. Game & Fish Com'n*, 133 S. Ct. at 522 (regulatory takings inquiry "includes

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[6] Professor McLaughlin notes that "it is surprising that so little has been written about either the extent to which conservation easements are subject to the power of eminent domain or who is entitled to what when land encumbered by a conservation easement is condemned." McLaughlin, *supra*, at 1904. According to McLaughlin, "conservation easements fit neatly within the U.S. Supreme Court's modern definition of property for eminent domain purposes," *id.* at 1908, and the weight of authority supports the conclusion that conservation easements are compensable under the Takings Clause. *Id.* at 1924-28.

[7] Here, the owners of the 44 townhomes remaining after the taking purchased their homes with the expectation that owners of 14 other townhomes would share the burden of paying for community services and facilities. The Fifth Circuit's approach denies these remaining homeowners any opportunity to show that they will be paying more as a result of the taking.

consideration of the property owner's distinct investment-backed expectations regarding the land's use") (internal quotation marks and citation omitted). Under the Fifth Circuit's reasoning, however, the Trust is left empty-handed. As Professor McLaughlin notes, "allowing condemning authorities to take easement-encumbered land without paying for the easement would have the perverse effect of making land protected for its conservation or historic values cheaper to condemn than similar unprotected land." McLaughlin, *supra*, at 1967.

To be sure, real covenants are not limited to these few examples, nor are their holders limited to well-heeled charities that can afford to fight back. The Fifth Circuit's holding threatens a wide spectrum of property holders.[8]

III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *KOONTZ*

The Fifth Circuit's holding that the covenantal right to collect homeowner association assessments is not compensable conflicts with a principle recognized by both the majority and dissent in *Koontz*: that an income stream from real property is a compensable property interest under the Fifth Amendment. There, in the course of rejecting the Government's argument that a demand for money could not give

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[8] In addition to private environmental interests, nonprofit associations and religious institutions, which often own rights similar to those at issue here, are also particularly vulnerable to economic development takings. *See, e.g.*, Somin & Adler, *supra*, at 652-53 (religious institutions).

rise to a takings claim under the circumstances, the Court observed:

> [T]he monetary obligation [demanded by the government] burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that 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.

570 U.S. at ___ (slip op. at 16) (citing, *inter alia*, *Palm Beach Cnty. v. Cove Club Investors Ltd.*, 734 So.2d 379, 383–84 (Fla. 1999), for the proposition that "the right to receive income from land is an interest in real property under Florida law.").

The dissent also acknowledged that the right to receive income is a compensable property right:

> When the government dissolves a lien, or appropriates a determinate income stream from a piece of property . . . the government indeed takes a "specific" and "identified property interest."

Id. at ___ (Kagan, J., dissenting) (slip op. at 16) (citation omitted).

There is no dispute that Mariner's Cove Townhomes Association had a covenantal right to receive homeowner dues—an income stream—from the properties that were taken. Likewise, there is no dispute that, in the event the dues from those properties had not been paid, the association would "have an immediate lien against the property." Pet. 54-55a. The Fifth Circuit's ruling that the

association's rights were not compensable conflicts squarely with the principles re-affirmed in *Koontz*.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted,

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