No. 01-1773

IN THE

Supreme Court of the United States

October Term, 2001

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,
Petitioner,

v.

COUNTY OF SANTA BARBARA, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, *ET AL.* IN SUPPORT OF PETITIONER
(Complete List of *Amici* Appears on the Inside Cover)

MARTIN S. KAUFMAN*
* Counsel of Record
BRISCOE R. SMITH
Atlantic Legal Foundation
150 East 42nd Street, 2nd Floor
New York, NY 10017
(212) 573-1960
Counsel for Amici Curiae

August 5, 2002

Complete list of *amici curiae*:

American Association of Small Property Owners
American Land Rights Association
Apartment Owners of South Eastern Wisconsin
Apartment Owners Association
of Southern California, Inc.
Chicago Creative Investors Association
Coalition for Property Rights, Inc.
Genessee Landlord Association
Georgia Real Estate Investors Association, Inc.
Greater Dayton Real Estate Investors Association
Homeowners Against Rent Kontrols
Illinois Rental Property Owners Association
Property Owner's Association of Greater Baltimore
Property Owning Women
Property Rights Foundation of America, Inc.
Suncoast Real Estate Investors Association, Inc.
United Lot Owners of Cambria

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INTEREST OF *AMICI*

Amici are organizations located throughout the United States whose purpose is to represent the interests of small property owners, through education, interaction with legislative and regulatory bodies, and through legal proceedings. They submit this brief in support of the petition for certiorari.[1,2]

Amici believe that this case is important to their members because it represents an opportunity for this Court to clarify the a very important issue in takings litigation, *i.e.* when a claim of takings is ripe, and thus when the statute of limitations runs.

Without such clarification, government units will be able to devise procedures which, as here, effectively render property owners' protections against uncompensated takings nugatory, impose substantial additional costs on property owners large and small, and burden the judicial system with multiple litigation arising from sequential governmental actions affecting the same property.

Amici urge the Court to grant the petition for certiorari.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

[2] Counsel for the parties have consented to the filing of *amicus* briefs by letters dated July 2, 2002 (Respondent County of Santa Barbara) and July 16, 2002 (Petitioner Joseph L. Cole), and filed with the Clerk of this Court.

INTRODUCTORY STATEMENT

The petition raises an important question, one which will affect hundreds of similar takings in California alone, but one that has not yet been addressed squarely by the Court in its takings jurisprudence: "When does a taking occur?"

The California courts have applied a procedural bar to strip petitioner of its constitutional rights, thus permitting the state to take for public use the beach front owned by petitioner without compensation.

Amici believe that this Court should gant the petition and answer that question because the decisions of the California courts which the petition asks this Court to review permit local authorities to circumvent this Court's rulings in *Nollan* and *Dolan* and effectively deprive property owners of their Fifth Amendment protection against uncompensated takings. This Court should also grant *certiorari* clarify and settle the question of when a taking occurs in the interests of judicial economy, because a definitive answer will eliminate the likelihood of multiple litigations challenging sequential governmental acts which property owner fears will start the clock running on the time to challenge a taking.

SUMMARY OF ARGUMENT

In this case, there are two critical dates: May 1980, when the then owner of the property executed an "offer to dedicate" a right of way for public access to the beach across her property, and March 2000, when the County of Santa Barbara accepted that offer. Under California law, the mere offer to dedicate did not convey any property interest, and until the County accepted the offer the owner retained the sole "the right to exclude others."*Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___U.S.___, n. 19, 122 S.Ct. 1465, 1479, 152 L.Ed.2d 517 (2002).

As a matter of federal law, a takings claim is not ripe until a final government decision is made. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) and "[T]he central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001).

In this case, the government entity charged with accepting the offer to dedicate did not reach a "final decision" to accept the offer with respect to this property until March 2000. The judgment of the California courts, that the time to challenge the "taking" began to run in 1980 is clearly contrary to this Court's precedents, and works to deprive Petitioner of fundamental federal constitutional rights.

ARGUMENT

The California courts have applied a procedural bar to strip petitioner of its constitutional rights, thus permitting the state to take for public use the beach front owned by petitioner without compensation.

The petition raises an important question, one which will affect hundreds of similar takings in California alone, *see* Petition for Writ of Certiorari at 4, 9, 18, but one that has not yet been addressed squarely by the Court in its takings jurisprudence. This Court's takings opinions have focused on whether a taking requiring just compensation has occurred. This case presents different issues: (a) when does a taking occur and (b) is that question answered by federal law or state imposed limitations. The Courts below decided both questions by applying California precedents, disregarding the decisions of this Court.

Beginning in the 1970s, the California Coastal Commission initiated a policy of exacting public access easements from beachfront property owners as a condition of approving building permits for all new development within the coastal zone. The Commission typically required owners of beachfront property to make an "offer to dedicate," ("OTD" or "offer") which would ripen into title to the easement only if a public agency accepted the offer.

In 1987 this Court held that the exaction of such public access easements as a condition of granting substantially unrelated building permits was "an out-and-out plan of extortion," and was

unconstitutional. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

On May 9, 1980, the Coastal Commission granted a "Coastal Development Permit" to Francice Netcher Bushkin . The permit authorized a small addition to an existing guest house on Bushkin's beachfront property in Santa Barbara County (the "property").[3] A "Special Condition" of the permit required that Bushkin record an "offer to dedicate" an easement to "the people of the State of California" for public access and recreational use along the beach extending from the mean high tide line to the bluff that separated Bushkin's property from a public road. The OTD stated that it could be accepted at any time within 21 years.[4]

When the Trust purchased the property in 1995, the property was subject only to an offer to dedicate, not to a permanent easement. Thus, the Trust retained the right to use and possess the property, as well as "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979).

When the Stanford Trust purchased the property in 1995, no "public interest' had been created in the easement at that point, because the offer to dedicate had not been accepted. *See Mikels v.*

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[3] Bushkin owned twenty-five acres of land overlooking the Pacific Ocean in Santa Barbara. Her property was improved with her residence, stables, farmhands' quarters, barns, a guest house and other outbuildings. The improved portion of Bushkin's property was separated from the beach by a 60 foot coastal bluff . *See* Opinion of the California Court of Appeal, Appendix to Petition 1a.

[4] The OTD was recorded in 1982.

Rager, 232 Cal. App. 3d 334, 354 (1991). Indeed, in 1995, the likelihood that the offer to dedicate would ever be accepted appeared remote because no public agency had shown any interest in accepting the offer; the County first held hearings with regard to acceptance of OTDs in October 1998.[5] Moreover, this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), had, at the very least, cast substantial doubt on the continued validity of all such offers to dedicate.

Prior to March 2000, the Trust had enjoyed full use and possession of the land underlying the easement, and had both the power and the right to exclude others from it[6]. After March 2000, however, the Trust held nothing more than bare legal title to that land because the County now exercised access rights over that portion of the Trust's property, and the Trust's right to exclude others had been extinguished. *See Copeland v. City of Oakland,* 19 Cal. App. 4th 717, 722 (1993) (upon acceptance of an offer to dedicate, "the property is thereafter held in trust for public use" and is "no longer subject to private control"). In fact, there is now what amounts to

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[5] *See* Opinion of the California Court of Appeal, Petition Appendix 2a.

[6] An offer to dedicate does not transfer any ownership rights to the public. *See Baldwin v. City of Los Angeles*, 83 Cal. Rptr.2d 178, 187 (Cal.Ct.App. 1999). Instead, in the Commission's words, "[t]he interest belongs to the property owner until the offer is accepted by a government agency or nonprofit organization." Brief of California Coastal Commission in the California Court of Appeal, on file in the California Court of Appeal, J.A. 178. "[T]he accepting entity obtains title to the easement" only when the offer to dedicate is *accepted. Id*. That second step -- acquisition of the easement itself -- did not occur here until the County accepted the offer to dedicate in March 2000.

a "permanent physical occupation" of the property, by virtue of the public's unfettered right to use the Trust's land "to pass to and fro." *See Nollan,* 483 U.S. at 832.

There is no dispute that until the County's acceptance of the offer, Petitioner -- as had Ms. Bushkin -- enjoyed exclusive access to the beach property, including the right to exclude others, and that by accepting the offer the County now asserts the right, to admit and exclude others, eliminating the property owner's right to do so. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___U.S.___, n. 19, 122 S.Ct. 1465, 1479, 152 L.Ed.2d 517 (2002); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The County's acceptance of the offer to dedicate in March 2000 constituted a taking of this unique and important set of property rights. Until the County acted, there had been no taking.[7]

In April, 2002, petitioner filed this action against the County, thirty days after the County accepted the offer to dedicate, invoking its constitutional rights under 42 U.S.C.§ 1983. The

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[7] The California cases have held consistently that an unconditional acceptance is required to complete a dedication and until that acceptance the public acquires no rights. *See* cases cited in the Petition for Writ of Certiorari at 12.

California courts rejected that claim, essentially ruling that the claim came in the wrong forum and was too late.

Certiorari should be granted to reverse the California courts' thus far successful effort "to put an expiration date on the Takings Clause," an effort denounced by this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see, e.g., Felder v. Casey*, 487 U.S. 131 (1988) (state notice of claim procedures are pre-empted when section 1983 action is brought in state court).

As a matter of federal law, a takings claim is not ripe until a final government decision is made. This proposition is plainly enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), which was relied on in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

As this Court recently observed, "the central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land."
Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001).

Justice Kennedy, writing for the majority in that case, said:

> In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. See *Danforth* v. *United States,* 308 U.S. 271, 284, 84 L. Ed. 240, 60 S. Ct. 231 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][i] ("It is well settled that when there

> is a taking of property by eminent domain in compliance with the law, it is the owner of the property *at the time of the taking* who is entitled to compensation"). A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."

533 U.S. 606 at 628.

Although the "California two-step" seen in this case effects a physical invasion of petitioner's property in this case, "the fact and extent of the taking" were certainly not known in 1980, when Bushkin executed and or in 1982 when she recorded the offer to dedicate; indeed, the fact of a taking was not known for certain until March 2000, when the County accepted the offer to dedicate.[8]

Of particular relevance here, Justice Kennedy noted that

> In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City,* 473 U.S. 172, 87

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[8] It could be argued that the Trust knew of the County's intentions in October 1998, when the then trustee filed a Notice of Revocation, but that was merely prophylactic, because the County had by then held hearings on accepting numerous OTDs. *See* Opinion of the California Court of Appeal Petition Appendix at 3a.

> L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."…. The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use of the land.

533 U.S. 606 at 618.

Justice Stevens, concurring in part and dissenting in part, noted that:

> Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, *e.g.*, *Danforth* v. *United States*, 308 U.S. 271, 284, 84 L. Ed. 240, 60 S. Ct. 231 (1939) ("For the reason that compensation is due at the time of taking, the owner at that time, not the

> owner at an earlier or later date, receives the payment")."

533 U.S. 606 at 639.

Even Justice Ginsburg, dissenting in *Palazzolo*, wrote:

> A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, "has arrived at a final, definitive position regarding how it will apply [those regulations] to the particular land in question." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City.

533 U.S. 606 at 645-646.

Here, "the government entity" charged with accepting the offer to dedicate did not reach a final decision regarding whether to accept the offer with respect to this property until March 2000.

In *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), this Court ruled that in a condemnation, a taking occurs either at the moment the government pays for the land or at the moment that it assumes occupancy. By analogy, the County did not "assume occupancy" of petitioner's land until it made the firm decision to exercise the option, or until it in fact exercised the option. The legal claim did not ripen and the time to sue certainly did not start running until then.

It is of course true that the County's acceptance of the offer cannot be divorced altogether from the offer itself, an analysis found compelling by the California courts. However, without the acceptance there is no deprivation of any property rights and thus no taking. "Until taking, the condemnor may discontinue or abandon

his effort," and, just compensation is "value at the time of the taking [and]…the owner at that time, not the owner at an earlier or later date" is the one to be compensated. *Danforth v. United States*, 308 U.S. 271, 283-284 (1939).

The California courts' rulings are based on the assumption that the entire taking occurred in 1982, when Bushkin signed the offer to dedicate. But the "just compensation" required by the Fifth Amendment does not have to "be paid in advance of, or contemporaneously with, the taking." *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194 (1985). The government's action is not "complete"-- and therefore ripe for judicial review -- "until the State fails to provide adequate compensation for the taking." *Id.* at 195. Prior to the County's acceptance of the offer to dedicate in March 2000, it is highly doubtful that either the Trust or Bushkin would have been entitled to compensation for the taking that occurred when the public actually acquired title to the easement. Until the right to compensation arose in March 2000, any such takings claim that had been brought would have been subject to dismissal on ripeness grounds.

One can readily and fairly predict that had Mrs. Bushkin commenced an action when the Coastal Commission extorted the option, she would have been met with the argument that no property rights had been taken, and that her action was not ripe.

As viewed by the California courts, adoption of a two-tiered takings procedure readily permits the state to avoid awarding any compensation when it first acts, and, then to claim undue delay or lack of exhaustion of state remedies when the taking ultimately is exercised.

CONCLUSION

The decisions of the California courts permit the California Coastal Commission and local authorities to circumvent this Court's rulings in *Nollan* and *Dolan*, and effectively deprive property owners of their Fifth Amendment protection against uncompensated takings. This Court should grant *certiorari* to reverse the California courts' thus far successful effort "to put an expiration date on the Takings Clause," denounced by this Court in *Palazzolo*. Granting *certiorari* to clarify the clarify and settle the question of when a taking occurs will also serve the interests of judicial economy, because such clarification will eliminate the likelihood of multiple litigations challenging sequential governmental acts which the property owner fears will start the clock running on the time to challenge a taking.

August 5, 2002

Respectfully submitted,

MARTIN S. KAUFMAN
Counsel of Record
BRISCOE R. SMITH
Atlantic Legal Foundation
205 East 42nd Street
New York, New York 10017
212-573-1960

Counsel for Amici Curiae

ADDENDUM

DESCRIPTION OF THE *AMICI CURIAE*

American Association of Small Property Owners is a nonpartisan, nonprofit 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO is the only national organization for small landlords, property owners and real estate investors to share information and strategies on important issues of the day. AASPO has chapters in more than 25 states.

American Land Rights Association is a national clearinghouse and support coalition, encouraging private property ownership, family recreation, multiple use of federal lands, commodity production, and access to federally controlled lands. ALRA has a membership of 10,000.

Apartment Association of South Eastern Wisconsin, is based in Milwaukee. It was formed in 1972, and serves the rental real estate owners community by providing education, legislative representation, and industry information. AASEW has approximately 1,200 members, and is the largest regional rental housing organization in the State of Wisconsin. Its membership consists of rental housing providers, both owner-operators and professional managers. AASEW provides screening assistance, education, and legislative support for property owners throughout

southeastern Wisconsin and northern Illinois. AASEW has a long history of supporting its members and the rental industry through participation in legal and political issues.

Apartment Owners Association of Southern California, Inc. is a trade association that provides educational and support services to apartment owners throughout the State of California. Located in Van Nuys, AOA was founded in 1978 and currently has 12,000 members.

Chicago Creative Investors Association provides educational, motivational and networking support to real estate investors in the Chicagoland area. It was founded in 1983 and currently has approximately 500 active members.

Coalition for Property Rights, Inc., based in Orlando, FL. Founded in 1972. Its purpose is to advocate for private property rights.

Genessee Landlord Association is a nonprofit trade association and has served the needs of landlords in the Flint, Michigan area for more than 25 years. It has more than 500 members.

Georgia Real Estate Investors Association, Inc. is the largest real estate investors association in the United States. With 2,200 members, Atlanta-based GaREIA brings together the novice, the part-time and the experienced investor with education, networking, publications and a monthly meeting of educators and business associates to share information. GaREIA started in the early 1980's.

Its mission is to assist its members in succeeding in their real estate investment plans by providing continuing education, motivation, and opportunity in a positive and mutually supportive environment.

Homeowners Against Rent Kontrols (HARK) is a nonprofit association for owner-occupants of rental buildings in New York State. It was formed in 1996 to fight rent regulation in the city, which imposes inordinate costs upon small property owners, and to serve as a resource for small property owners facing impenetrable administrative agencies. Membership is open to all owners of buildings under 30 feet in width and under six stories in height. Its mission is to create an environment which is more supportive of the rights of homeowners who must contend with as many as 24 government agencies that regulate their businesses. HARK engages in lobbying the legislature and providing information on the true state of affairs regarding rents and regulation to the public. HARK addresses these issues by organizing letter-writing campaigns, providing statistical and other factual data to media representatives, and by organizing lobbying and protest visits to the state capital in Albany.

Illinois Rental Property Owners Association is an organization of rental property owners, investors, and managers in Illinois. It unites numerous member organizations from around the state, comprising approximately 4,000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Property Owner's Association of Greater Baltimore, Inc. was established in 1957, and is a voluntary trade association consisting of hundreds of owners and/or managers of rental property in the Greater Baltimore metropolitan area. Its members own or control tens of thousands of rental units in the Baltimore area and range from owners of a few single family rental units to owners of hundreds of single and multi-family dwellings. The Association provides services to its members and the community in general, including educational seminars and mediation in landlord-tenant disputes. It also provides guidance and support to the Governor of Maryland and the Maryland General Assembly.

Property Owning Women is a nonprofit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

Property Rights Foundation of America, Inc., (PRFA) is a not-for-profit corporation in the State of New York and is based in Stony Creek, New York. PRFA is an educational organization dedicated to the constitutional right to own and use private property to the full extent guaranteed in the United States Constitution. PRFA holds the annual New York Conference on Private Property Rights and publishes the Proceedings of this conference. PRFA also publishes the *Positions on Property Journal*, the *New York Property Rights Newsletter*, and numerous other publications and maintains a web site, www.prfamerica.org. About half of PRFA's participants

and supporters are in the State of New York, and the other half in the other 49 states. Its participants include property owners in from rural and urban areas. PRFA's members are individual property owners and businesses engaged in forestry, tourism and manufacturing.

Suncoast Real Estate Investors Association, Inc. has 400 members, who provide safe and affordable housing to Tampa, Florida. It is a nonprofit corporation that exists to inform and educate its members in all aspects of real estate investing.

United Lot Owners of Cambria (UnLOC), based in Cambria, California, is a grass-roots non-profit corporation of the owners of Cambria's vacant residential building lots. UnLOC's mission is to protect the property rights of owners of vacant building lots while advocating for the wise planning and use of resources for the entire community. UnLOC was formed in 2001 as a non-profit corporation under California law. It has approximately 120 active members. UnLOC protects the rights of vacant lot owners through lobbying, legal action, and technical expertise concerning land use, zoning, and provision of public services.

Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that three copies of the foregoing brief of *amici curiae* American Association of Small Property Owners, *et al.* in support of the petitioner were served on the following counsel of record for the parties on the 5th day of August, 2002, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to them at:

Theodore N. Miller and Anne Mayer Turk
Sidley Austin Brown & Wood LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Counsel for Petitioner

Carter G. Phillips (Counsel of Record) and Joseph R. Guerra
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
Counsel for Petitioner

Stephen Shane Stark, Alan Seltzer and William M. Dillon
County Counsel
County of Santa Barbara
105 East Anapamu Street, Suite 201
Santa Barbara, CA 93101
Counsel for Respondent

Joseph Barbieri
Deputy Attorney General
State of California, Department of Justice
Office of the Attorney General
1515 Clay Street
Oakland, CA 94612-1413
Counsel for Amicus Curiae California Coastal Commission

Dated: August 5, 2002

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Martin S. Kaufman