No. S194861

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA REDEVELOPMENT ASSOCIATION, et al.,

Petitioners,

v.

ANA MATOSANTOS, et al.,

Respondents.

APPLICATION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRIUDENCE AND CALIFORNIA ALLIANCE TO PROTECT PRIVATE PROPERTY RIGHTS

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Supreme Court of the State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: S194861

Case Name: *California Redevelopment Association, et al. v. Matosantos, et al.*

Please check the applicable box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.488.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person Information if necessary.

September 30, 2011.

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RULES

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.520(f), the Center for Constitutional Jurisprudence and California Alliance to Protect Private Property Rights respectfully submit this application for permission to file a brief as *amicus curiae* in support of neither party.[1]

INTEREST OF *AMICUS CURIAE*

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the propositions that the individual right to own and use private property is a core freedom in our state and federal constitutional structure and that the Legislature must adhere to the limits imposed on its powers. In addition to providing counsel for parties at all levels in state and federal courts, the Center has participated as *amicus curiae* before California Courts in several cases including *Sander v. State Bar*, 196 Cal. App. 4th 614 (2011); *County of Orange v. Association of Orange County Deputy Sheriffs*, 192 Cal. App. 4th 21 (2011); *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074 (2008); and *Fontana Redev. Agency v. Torres*, 153 Cal. App. 4th 902 (2007). As an advocate for constitutional fidelity at both the state and federal level, the Center has also participated as *amicus* in several cases of

[1] Pursuant to Rule 8.520(f)(4), no party or counsel for any party authored any portion of this brief. No person other than amici, its members, or its counsel made a contribution to fund the preparation and submission of this brief.

constitutional significance before the United States Supreme Court including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The California Alliance to Protect Private Property Rights ("the Alliance") is a coalition of family farmers, community and taxpayer advocates committed to exposing the dangers and abuses of eminent domain — government's taking of private property from unwilling sellers to benefit politically connected developers. Marko Mlikotin is the President of the Alliance.

The Alliance is a non-profit public benefit corporation pursuant to California law, and is exempt from income tax pursuant to Section 501(c)(4) of the federal Internal Revenue Code. The Alliance was founded in 2005 when Yolo County attempted to use its power of eminent domain to seize the 17,300 acre Conaway Ranch from its unwilling sellers. What began as a local effort to protect Yolo County's farmland from a county determined to erode private property rights has grown into a statewide movement. Today, the Alliance exists to preserve the constitutional rights of private property owners and advocates for effective legislative reforms that will eliminate abuses of eminent domain.

Amici believe the issue before this Court is one of special significance for the future of state governance. At issue is the ability of the Legislature to correct an ill-conceived venture that allowed local agencies to undercut individual rights in private property while at the same time diverting tax revenue from general governmental purposes. There are ample justifications for the Legislature's decision to curtail any future redevelopment projects.

Amici are familiar with the issues in this matter and the scope of their presentation before this Court. Amici believe that this brief will assist the Court in identifying the many purposes for the Legislature's action to disband redevelopment agencies and further in identifying the key principles on the question of severability.

For the foregoing reasons, the Center for Constitutional Jurisprudence, California Alliance to Protect Private Property Rights, and Institute for Justice respectfully request that this application be granted, and that the Court accept the attached brief of amicus curiae in support of neither party.

INTRODUCTION

Reacting to an increasing budget emergency and a wealth of information that redevelopment agencies have failed to bring about the promised economic benefits, the California Legislature reacted with two new pieces of legislation. The first terminates current redevelopment agencies and transfers the duty to make ongoing debt repayments to a successor agency with no power to create new debt. The second offers the agencies an opportunity to remain in existence, but requires transfer of some of their revenue to the state as the price of that bargain. Both measures, however, evidence a legislative intent to rein in redevelopment agencies. Indeed, the only purpose for which they are allowed to continue in existence is to help eliminate California's budget shortfall.

Unfortunately for the budget, however, these financial provisions cannot withstand scrutiny. California voters have clearly foreclosed the option for the Legislature to compel revenue transfers from redevelopment agencies. The Legislature and Governor understood that this might be the case and provided in both bills that the provisions phasing out California's failed experiment with redevelopment agencies should continue in effect.

Because there is a clearly expressed legislative intent to terminate redevelopment agencies, amici urge that the petition be granted with regard to ABX1 27 but denied as to ABX1 26. This Court has already received extensive briefing on the unconstitutionality of ABX1 27 and the

constitutionality of ABX1 26. Amici adopt those arguments and focus instead on "severability" (something of a misnomer since we are dealing with separately enacted pieces of legislation) and the policy reasons that support the Legislature's decision to terminate our failed experiment with redevelopment.

I. AS A SEPARATELY ENACTED LAW, ABX1 26 SURVIVES EVEN AFTER ABX1 27 IS DECLARED UNCONSTITUTIONAL

The parties are analyzing this question as if the provisions of ABX1 26 and 27 were contained in a single piece of legislation. Were that the case, this Court would be called on to employ the severability analysis used when only one part of a legislative enactment is found to violate the Constitution. That, of course, is not the case here. There are two completely separate pieces of legislation – petitioners seek to strike both on the basis that one of them violates the Constitution. Petitioners reach this startling conclusion by use of the severability test that only applies to single pieces of legislation. Amici have not been able to locate a single California case that has applied severability analysis to two separate pieces of legislation. If ABX1 27 is stricken (as amici believe it should be), there is nothing to sever. ABX1 26 is a separately chaptered law that exists independent of ABX1 27.

ABX1 26's *enactment* was contingent on the enactment of ABX1 27. ABX1 26, § 14. That contingency was fulfilled with the Governor

signed ABX1 27 into law. Other than that one contingency, there is no provision of ABX1 26 that requires the continued enforcement of ABX1 27. Indeed, ABX1 26's own severability clause (section 12) relates only to its own provisions and announces a clear legislative intent that redevelopment agencies wind down their affairs and go out of business.

While it should be clear from the structure of these two measures that they each have a separate legal existence, the Legislature removed all doubt with section 4 of ABX1 27. That section emphasizes that the provisions of ABX1 27 are separate and distinct from the legal changes effected by ABX1 26. Even if the Legislature could not coerce extra revenue from redevelopment agencies, the Legislature and Governor were firm in their decision that redevelopment agencies go out of business.

Petitioners seek to circumvent this clear expression of legislative intent by arguing that section 4 of ABX1 27 has no *legal* effect because the rest of the measure is unconstitutional. From this premise, petitioners launch into their severability analysis and conclude that this Court should assume that the Legislature would not have enacted ABX1 26 if it could not also have ABX1 27. The Court must make this assumption even in the face of a contrary expression of intent by the Legislature. This invitation to crystal gazing to determine what the Legislature "might have done" when the Legislature has been quite clear in its position is nothing less than an invitation to judicial lawmaking.

Whether section 4 has any *legal* effect is quite beside the point. Next to all the evidence of legislative "intent" on which petitioners build their argument, only section 4 was actually considered by the Legislature, approved by the requisite majority vote, and signed by the Governor. There can be no clearer evidence of intent than what the Legislature actually did in this case.

The argument for use of the severability analysis does petitioners no good either. In point of fact, the standard for severing portions of a statute is not all that difficult to meet in California. For example, in *Hotel Employees v. Davis*, 21 Cal. 4th 585 (1999), this Court severed and preserved *a single sentence* out of larger statutory enactment, finding that that one sentence was sufficiently independent of the rest of the measure. *Id.* at 615.

Were the Court dealing with but a single legislative measure (rather than the two separate measures at issue in this case), it would look to the "the three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." *CalFarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 822 (1989). The first test, mechanically and grammatically severable looks to whether excising the offending portion affects the operation of the remaining provisions. *Legislature v. Eu*, 54 Cal. 3d 492, 535 (1991). This is easily met in this case since the measures are

already mechanically and grammatically separate – they are two different pieces of legislation, each separately enacted, signed and chaptered.

The second test is also easily satisfied. As this Court noted in *CalFarm*, a provision is functionally severable where it merely eliminates an exception to the general rule "permitting the general standard to operate." *CalFarm*, 48 Cal.3d at 822. Here, the entire body of ABX1 27 operates as an exception to the general standard in ABX1 26. ABX1 26 establishes the general rule that redevelopment agencies must go out of business. ABX1 27 purports to offer an exception to that general rule in exchange for certain revenues. Just as in *CalFarm*, the finding that ABX1 27 is unconstitutional merely eliminates an exception to the general rule set out in ABX1 26. This point is further emphasized by section 4 of ABX1 27 noting the Legislature's intent that redevelopment agencies be abolished even if the exception they provided cannot take effect.

Finally, the severability test looks to volitional severability – whether the measure would have been adopted without the invalid portion. *Hotel Employees*, 21 Cal. 4th at 615; *Legislature v. Eu*, 54 Cal. 3d at 535; *CalFarm*, 48 Cal. 3d at 822. The Court cannot rely on the contingent enactment language in ABX1 26 to resolve this question. The test does not ask what the Legislature actually did, but rather what they would have done. In other words, the question is whether ABX1 26 would have been enacted "even if [the Legislature] had known [ABX1 27] could not

constitutionally be given effect." *Hotel Employees*, 21 Cal. 4th at 615. This is the critical question of legislative intent, and it is answered in the affirmative by the Legislature. Section 4 of ABX1 27 states that it is the Legislature's intent that the reforms enacted by ABX1 26 continue in effect if ABX1 27 is found unconstitutional. There is no need to guess at the answer to the volitional severability question. The Legislature clearly considered the question, took a vote, and expressed their intent in a measure signed into law by the Governor. That the law itself cannot take legal effect is of no moment – the question here is what the Legislature intended. That question is answered in Section 4 of ABX1 27. Thus, even if the Court resorts to the unprecedented step of using severability analysis on two separately enacted measures, ABX1 26 survives that analysis and continues in effect.

II. THERE ARE SOUND REASONS OF PUBLIC POLICY THAT SUPPORT THE LEGISLATURE'S DECISION TO TERMINATE THE FAILED REDEVELOPMENT EXPERIMENT

There are approximately 400 redevelopment agencies in the state of California. *Redevelopment after Reform: A Preliminary Look,* Legislative Analyst's Office, White Paper, Dec. 29, 1994. The Legislature authorized the creation of these agencies in 1945, hoping to spur development and migration following World War II. *Id.* Redevelopment agencies function by declaring an area within the city as "blighted," which will then subject

private property in that area to condemnation and a building program to erase the "blight." Health & Safety Code § 33030, 33391. The cost for the condemnation of the private property and new building is financed by the presumed increase in property taxes that results from improvement of the property. Health & Safety Code § 33670. Because the "blighted" property that is condemned in this process can be handed over to a private development company, there is a significant financial incentive to stretch the definition of blight. Colin Gordon, Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight, 31 Fordham Urb. L.J. 305, 307-08 (2004).

Under this system, individual rights in private property are at risk and the financing of public services, including public education, is jeopardized all in the name "redevelopment." The cost to taxpayers who must make up this lost revenue is estimated to total nearly $2 billion a year. Kevin Yamamura, *California Budget Shortfall Twice as Large as Predicted,* The Sacramento Bee, p. A1, Nov. 11, 2010; *Should California End Redevelopment Agencies?,* Legislative Analyst Office, Policy Brief, February 9, 2011 available at: http://www.lao.ca.gov /analysis/2011/realignment/redevelop-ment_020911.pdf.

The theory is that all this is worth the economic gain that redevelopment agencies create. The problem, however, is that those gains are often illusory. A two-year study conducted by the non-partisan Public

Policy Institute of California found that three-fourths of the redevelopment projects in the state failed to generate most of the tax revenue the agencies receive. Michael Dardia, *Subsidizing Redevelopment in California,* Public Policy Institute of California, Jan., 1998 available at: http://www.ppic.org/content/pubs/report/R_298MDR.pdf. This exhaustive study shows that while redevelopment projects fail to generate enough tax revenue to fund future redevelopment projects, redevelopment agencies continue to initiate new projects that incur more debt and divert tax revenue from other critical public needs. "[W]hen a redevelopment agency receives property tax revenues, those revenues are lost to other local jurisdictions - the county and schools . . . .[and] if the redevelopment agencies are not largely responsible for the increase in property values, those jurisdictions are, in effect, subsidizing redevelopment with no say in how the revenues are used." *Id.* at iv. It is the state's taxpayers, when funds are siphoned from schools, who have to pay for failed or marginal redevelopment projects.

The Legislative Analyst's Office this year also studied and audited many of the redevelopment agencies' activities and found that there is "no evidence" the redevelopment agencies increase economic development or attract businesses to the state. *Should California End Redevelopment Agencies?,* Legislative Analyst Office, Policy Brief, February 9, 2011

available at: http://www.lao.ca.gov/analysis/2011/realignment/ redevelopment_020911.pdf.

This study found that the redevelopment agencies frequently take actions that hurt the productivity of their programs, that the redevelopment projects have a "minimal" effect on property values and provide little, if any, increase in economic activity. *Id.* These results are corroborated by another report that studied cities throughout the country using redevelopment agency programs similar to California's. That report concluded that redevelopment is simply not an effective means to spur economic development. Richard F. Dye and David F. Merriman, "The Effect of Tax Increment Financing on Land Use," in Dick Netzer, ed., *The Property Tax, Land Use, and Land-Use Regulation* (Cheltenham, United Kingdom, Edward Elgar Publishing: 2003); *See also* Richard F. Dye and David F. Merriman, The effects of tax increment financing on economic development, *Journal of Urban Economics,* 46, 306-328 (studied municipalities in the city of Chicago and found that its redevelopment agencies had a "negative impact on a municipality's aggregate property value growth."). Rather than create new opportunities, redevelopment merely redirects economic activity to the project area, at the expense of other areas of the city or other communities. *Id.* Research shows that redevelopment programs are simply bad public policy

Proponents of redevelopment agencies often argue that their work promotes jobs and economic activity. There is little evidence to support this assertion. A recent study found that redevelopment agencies have very little impact on job growth within municipalities. Paul F. Byrne, "Does Tax Increment Financing Deliver on Its Promise of Jobs? The Impact of Tax Increment Financing on Municipal Employment Growth," *Economic Development Quarterly* 24:13 (2010) available at: http://edq.sagepub.com/content/24/1/13. ("Any increase in employment from these projects is the result of shifting jobs from elsewhere in the city."). Another study, by California State University researchers, found that redevelopment agency projects actually *decreased* the employment rate of residents within the vicinity of the development. John E. Anderson and Robert W. Wassmer, *Are Local Economic Development Incentives Effective in anUrban Area?* California State University, Public Policy and Administration Working Paper No. 99-03(November 18, 1999) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=195148). Based on its finding that there was "little evidence to support the belief that" the benefits of redevelopment agencies outweigh the costs, the study authors recommended elimination of the agencies unless serious reforms could be implemented. *Id.*

Empirical evidence corroborates these two studies. State audits from 2004-05 through 2008-09, the last period such audits were conducted,

discovered that about 300 of the state's 400 redevelopment agencies did not list any jobs created or new construction. Rick E. Rayl, *Redevelopment Agencies and Eminent Domain*, The California Eminent Domain Report, Feb. 7, 2011. The jobs that redevelopment projects do create, furthermore, cost state and local governments $60,000 for every job, according to the W.E. Upjohn Institute of Employment Research. Tim Cavanuagh, *The $6 Billion Scam*, Reason Magazine, March 17, 2011. The use of redevelopment agencies to build a new sports stadium is one example the failures outlined above. A *Brookings Institution* study found that "a new sports facility has an extremely small (perhaps even negative) effect on overall economic activity and employment." Andrew Zimbalist and Roger G. Noll, *Sports, Jobs and Taxes: Are New Stadiums Worth the Cost?,* The Brookings Institution, Summer 1997, available at: http://www.brookings.edu/articles/1997/summer_taxes_noll.aspx. Economic development and job growth, however, are not the only objectives of redevelopment agencies.

The other primary objective of redevelopment agencies consists of developing affordable housing. By law, 20% of redevelopment agency funds must be used to further that objective. Of that 20%, the largest share, however, does not go towards providing housing but instead for "debt service" according to the most recent analysis of the California Department of Housing and Community Development. Dardia, at 82. Another 13%

was used for "planning and administration. *California Redevelopment Agencies-Fiscal Year 2007/2008, Details of Expenditures: Planning and Administration Costs,* California Department of Housing and Community Development, May 1, 2009 available at: http://housing.hcd.ca.gov/hpd/rda/07_08/ex_c-7_07-08.pdf. Further, a recent study found that redevelopment agencies consistently misuse funds allocated for affordable housing under the guise of "planning and administration." Nancy Vogel, et al., *Where Does the Affordable Housing Money Go? Administrative Spending by Redevelopment Agencies Lacks Accountability* (California Senate Office of Oversight and Outcomes: September 30, 2010) available at: http://www3.senate.ca.gov/deployedfiles/vcm2007/senoversight/docs/afforedable%20housing%20report.pdf. Indeed, some redevelopment agencies used *all* of their affordable housing funds in the last 10 years on "planning and administration," clear evidence of waste and corruption. Mao Yang, *The Low-Mod Fund: Redevelopment Agencies Spending 100% of Total Expenditures on Planning and Administration,* Thesis, Master of Public Policy and Administration, California State University, Sacramento (Spring 2007) (available at Sacramento State University Eureka Library).

In 2010, the *Los Angeles Times* conducted an investigation into redevelopment agencies and how they comply with their mandate to provide affordable housing. The investigation found that "at least 120

municipalities -- nearly one in three with active redevelopment agencies -- spent a combined $700 million in housing funds from 2000 to 2008 without constructing a single new unit." Jessica Garrison, Kim Christensen, et al., *Arrested Development: Affordable Housing Get Short Shrift,* Los Angeles Times, p. A1, October 3, 2010. Among other things, the *Times* investigation found:

> Santa Ana and Avalon, officials spent millions on projects that knocked down homes, displaced low-income people and worsened blight without producing anything in its place. Block after block in a 94-acre area east of Santa Ana's civic center is lined with boarded-up buildings and vacant lots. In the Santa Catalina Island city, where housing is so scarce that workers sometimes sleep in the bushes, a half-block of property where cottages were razed to make way for more homes has sat, sun-baked and undeveloped, for 15 years.

Id.

This abuse can take place because there is very little oversight of the activities of redevelopment agencies. Due to budget concerns, the California Department of Housing and Community Development ceased auditing redevelopment agencies in 2008 despite finding dozens of violations of the law in over 40 cities that year. *Id.* Moreover, the Senate Office of Oversight and Outcomes found that no state agency oversees the redevelopment agencies and accountability is left to local city councils whose members are also typically the board members of redevelopment agencies. Robert P. Silverstein, *Redevelopment Agencies Stomp on the Little People*, The Sacramento Bee, p. 13A, March 3, 2011. It is little

wonder, then, that the California Senate found a $1.3 billion discrepancy between the Controller and the redevelopment agencies over how much money the agencies were holding. Steven Greenhut, *California's Secret Government*, The City Journal, Vol. 1, No.2, Spring 2011.

Once the redevelopment agencies are challenged on their finances, serious errors come to light. The State Controller in 2008 found that Los Angeles redevelopment agencies shorted schools and city services by over $60 million and the City of Industry failed to pay over $20 million it owed schools in 2005, in just two egregious examples. Kim Christensen and Jessica Garrison, *Arrested Development: Lots of Cash and Little Scrutiny,* Los Angeles Times. p. A1, Oct. 1, 2010. And the Orange County Superior Court ruled in 2002 that the city of Yorba Linda's redevelopment agency owed local school districts $240 million. Daniel Yi, *Judge's Ruling Will Net School District Millions,* Los Angeles Times, p. B3, July, 20, 2002.

These problems are inherent in the redevelopment system. Cities compete against each other, using redevelopment agencies, to attract businesses and redevelopers, inspiring strategic interactions with each other and with developers. P.F. Byrne, Strategic Interaction and the Adoption of Tax Increment Financing, 35 *Regional Science and Urban Economics*, 279-303 (2005). "Tax revenues are used as subsidies to attract new businesses. The immediate gainers are subsidized businesses. The immediate losers are taxpayers . . . who are required to pay the normal running expenses of

government without the assistance of new tax revenues from the project area." *Regus v. City of Baldwin Park,* 70 Cal. App. 3d 968, 981-82 (1977). Redevelopment agencies drive up the cost of redevelopment at taxpayer expense by trying to compete with other cities to give the best and most lucrative deal to private developers. The system fosters "desperate competition [for] retailers, [by] offering generous subsidies, going easy on design and planning standards for big box discounters and megalithic shopping malls and utilizing eminent domain to facilitate the expansion of big sales tax producers." George Lefcoe, *Redevelopment Takings* After *Kelo: What's Blight Got to do With It?,* 17 S. Cal. Rev. L. & Social Justice 803, 847 (Summer 2008). All of this goes unreviewed: "Despite significant fiscal interest in redevelopment, no state agency regularly reviews proposed new project areas for compliance with state law." *State Oversight of Redevelopment,* Legislative Analyst's Office, Nov. 17, 2005 (presented to Senate Local Government Committee and Assembly Housing & Community Development Committee).

As can be seen, the long experiment with redevelopment provides ample reason for the Legislature's decision reflected in ABX1 26. This Court should not lightly displace the Legislature's sound policy decision.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the portion of the petition seeking to declare ABX1 27 unconstitutional and deny the portion seeking to strike down ABX1 26.

DATED: September 30, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520, I hereby certify that the foregoing APPLICATION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND CALIFORNIA ALLIANCE TO PROTECT PRIVATE PROPERTY RIGHTS IN SUPPORT OF NEITHER PARTY is proportionately spaced, has a typeface of 13 points or more, and contains 3,971 words.

DATED: September 30, 2011.

ANTHONY T. CASO

DECLARATION OF SERVICE

I, Anthony T. Caso, declare as follows:

I am a resident of the State of California. I am over the age of 18 years and am not a party to the above-entitled action.

Before 5:00 pm on September 30, 2011, true copies of APPLICATION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND CALIFORNIA ALLIANCE TO PROTECT PRIVATE PROPERTY RIGHTS IN SUPPORT OF NEITHER PARTY were emailed and placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Orange, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 30th day of September, 2011, at Orange, California.

ANTHONY T. CASO