PACIFIC LEGAL FOUNDATION

June 18, 2009

The Honorable Pamela Ann Rymer, Andrew J. Kleinfeld, and Barry G. Silverman
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: Waiver Arguments in *Griswold v. City of Carlsbad*, No. 07-56572

Dear Judges Rymer, Kleinfeld, and Silverman:

There are two potential waiver arguments in this case. The first is that the Neighborhood Improvement Agreement (NIA) the Griswolds signed explicitly waives their right to sue. *See* Excerpts of Record (ER) 2:065. As indicated below and in the Appellants' Reply Brief, this explicit waiver is unenforceable because it fails the applicable balancing tests. The second argument is that because the Griswolds renovated their home pursuant to the building permit, they are estopped or have otherwise waived their right to challenge the legality of the NIA. This argument also is unpersuasive. First, the equities weigh heavily against the City and equity cannot enforce an agreement that violates the California Constitution; second, the NIA was imposed on the Griswolds as an adhesive, take-it-or-leave-it condition, and was not the product of mutual exchange necessary for the application of estoppel; third, the City cannot show the reliance necessary to make an estoppel argument, since its only interest is to create an illegal alternative to the California Constitution's exclusive mechanism for assessing property.

In addition, regardless of whether the Griswolds' building permit is characterized as a discretionary benefit, the doctrine of unconstitutional conditions forbids the City from forcing the Griswolds to give up their constitutionally guaranteed rights in exchange for such a permit.

Finally, while state regulatory takings law does bar a party from accepting a building permit subject to conditions while simultaneously seeking just compensation for those conditions, this is not a regulatory takings case, and the Griswolds do not seek just compensation. Instead, they are challenging the constitutional legitimacy of the condition. State regulatory takings law does not apply here.

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I. THE NIA'S EXPLICIT WAIVER OF THE RIGHT TO SUE IS UNENFORCEABLE

A. Federal Law Determines the Validity of a Waiver of the Right to Sue Under Section 1983

Waivers (whether express or implied) of the right to sue under Section 1983 are a matter of federal law. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991), *cert. denied*, 501 U.S. 1252 (1991) ("The question whether the waiver of federal constitutional rights is enforceable is a question of federal law, which we resolve by the application of federal common law."); *accord*, *Lynch v. City of Alhambra*, 880 F.2d 1122, 1125 (9th Cir. 1989).

Such a waiver is enforceable only if (1) it was voluntarily entered into and (2) if enforcement would serve the public interest. *Id.* at 1126. Moreover, the government bears the burden of establishing the enforceability of such a waiver. *Id.* at 1126 n.5; *Davies*, 930 F.2d at 1396. That burden is extremely heavy, because courts will "indulge every reasonable presumption against waiver of fundamental constitutional rights." *United States v. Preciado*, 175 Fed. Appx. 160, 161 (9th Cir. 2006) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("There is a presumption against the waiver of constitutional rights."); *Gonzalez v. County of Hidalgo, Texas*, 489 F.2d 1043, 1046 (5th Cir. 1973) ("[A] heavy burden must be borne by the party claiming that a 'voluntary, intelligent, and knowing' contractual waiver has occurred.").

The plaintiff in *Davies* signed a settlement agreement promising never to seek or accept any office with a high school district. When he later ran in an election for a position on the school board, the district sued to enforce the agreement. The trial court ordered him to resign his office, but this Court reversed that decision. It applied the appropriate balancing test, weighing the public policies favoring nonenforcement of the waiver against the factors favoring enforcement. 930 F.2d at 1397-98. It concluded that the waiver was unenforceable. *Id.* at 1399. In *Lynch*, the Court found that the plaintiff did voluntarily waive his right to sue for violations of civil rights, 880 F.2d at 1126-27, but remanded to the district court to determine whether enforcement of the waiver would serve the public interest. *Id.* at 1127-28.

Here, the voluntariness of the waiver is dubious. Although the City invited the Griswolds to negotiate over the terms to be included in the NIA, it eventually cut off all negotiations, refusing to include any of the Griswolds' suggestions, and compelled them either to (a) sign it as-is, (b) pay the $114,979 assessment immediately, or (c) be denied their building permit. ER 2:093. The agreement was therefore not the product of mutual bargaining. Indeed, the City's litigation position is that such waivers are required in *all* such cases, and that the City would under no circumstances have accepted the suggestion to remove the waiver provisions. *See* Answer Brief at 18. It is therefore an adhesive contract.

More importantly, public policy weighs against enforcement. The NIA burdens what the *Davies* court called a public interest "of the highest order," 930 F.2d at 1397: namely, the right to vote, or to participate in other ways in the democratic process established by Article XIIID of the California

Constitution. It does so in two steps: first, the City imposes an expensive and illegal assessment on property owners[1] and, second, it offers property owners the alternative of signing the NIA, waiving both their right to vote and their right to sue over the validity of the NIA or the assessment. This policy has vital effects on public policy.

Davies took special notice of the offensive nature of agreements like the NIA:

> To treat political rights as economic commodities corrupts the political process. **Just as we would not enforce a contract stating that voter X will vote for candidate Y in exchange for a sum of money**, so too we will not enforce an agreement whereby a citizen receives money in exchange for a promise not to exercise his right to run for office . . . . [Such agreements are] harmful . . . offensive . . . [and] a serious abuse of . . . power.

Id. at 1398-99 (emphasis added). The NIA agreement does, in fact, state that the Griswolds will refrain from voting against the formation of an assessment district in exchange for a sum of money—specifically, in exchange for the deferral of the illegal $114,979 assessment. To enforce the waiver of the right to challenge these tactics in court would corrupt the political process, and enable the City both to use heavy-handed tactics to evade the democratic rules established by the state Constitution and to insulate itself from lawsuits.

In *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), by contrast, a labor union signed a collective bargaining agreement limiting its ability to make certain political endorsements. Applying *Davies*, this Court found that the agreement was voluntarily formed by sophisticated parties in a fair, arm's-length transaction. *Id.* at 890. It was not the product of unequal bargaining power, *id.*, and enforcement served legitimate interests encouraging collective bargaining. *Id.* Finally, the Court found that the agreement imposed only a "narrow limitation" on the union's expressive rights, *id.* at 892, observing that if it had imposed "a complete ban on all Union political speech, we might well hold that the public interest in allowing and hearing such speech outweighs the public interests in enforcing the waiver." *Id.* at 891.

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[1] It bears emphasizing that the initial $114,979 assessment was itself illegal. In oral argument, City's counsel claimed the City has "police power" authority to impose such assessments, but Article XIIID, like all of the Constitution, is a *limit* on the police power, and it provides the *exclusive* mechanism for assessing property in California. *Barratt Am., Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 818 (2004) ("Proposition 218 [*i.e.*, Article XIIID] thus conflicts with and renders unconstitutional contradictory procedures or process leading to the adoption or levy of an assessment falling within its ambit.").

Indeed, *the language of the NIA itself acknowledges this fact*. On page 3, it admits that "Article XIIID of the State of California . . . establish[es] certain procedures and requirements which apply when any agency such as the City considers the levy of assessments," ER 2:062, and then purports to "waive[] Owner's rights under the Assessment Law." ER 2:064. Thus the City cannot claim this case involves anything other than the attempted evasion of the California Constitution.

The NIA falls short of this test in every respect. It is a contract of adhesion over which negotiation was not allowed; it is the product of unequal bargaining power between the City and an individual homeowner; enforcement would serve no valid public interest; and the waiver, rather than being a limited restriction on the Griswolds' constitutional rights, forbids them from "fil[ing] or bring[ing] *any protest, complaint, or legal action of any nature whatsoever*, challenging the validity of the proceedings to form the Assessment District and/or the validity of the imposition of the Assessment." ER 2:065 (emphasis added).

To paraphrase *Davies*, eliminating the Griswolds' rights to vote or to sue over this unconstitutional assessment procedure—and depriving their successors in interest of these rights[2]—would threaten the fundamental right of every member of the Carlsbad community to participate in the democratic process under Article XIIID. The public interest favoring nonenforcement is overwhelming.

As to factors favoring enforcement, the NIA's waiver provisions doubtless make it easier for the City to accumulate proxy votes with which to approve the future formation of an assessment district and assess Carlsbad homeowners without costly litigation. But these interests cannot weigh heavily, since the accumulation of proxy votes is in direct contravention to the state Constitution. The City's efforts to breach its constitutional limits is not a legitimate government interest. Thus the purported waiver of the right to sue in the NIA is unenforceable as a matter of federal law.

B. Regardless of Whether the Griswolds' Building Permit is Characterized as a "Benefit," the Government May Not Condition Upon it a Waiver of Their Right to Sue

It is unnecessary to decide whether a building permit should be characterized as a "governmental benefit" or not. Both the California and United States Supreme Courts have held that "'[t]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit,'" *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 870 n.7 (1996) (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987)). But even if it were wholly gratuitous, the government may not impose conditions on it that violate the Constitution.

The *Nollan* line of cases has been described as "involv[ing] a special application of the 'doctrine of "unconstitutional conditions,"' which provides that 'the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). Under that doctrine, government may not generally require parties to waive their constitutional rights even in exchange for gratuitous benefits. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[T]he government 'may not deny a benefit to a person on a basis that infringes his constitutionally

[2] As indicated on pages 2, 22, and 28 of the Appellants' Opening Brief and pages 1 and 18 n.3 of the Appellants' Reply Brief, the Griswolds' appeal asserts both their own rights under Article XIIID and the rights of any successors in interest.

protected . . . freedom of speech' even if he has no entitlement to that benefit."); *accord, Evans v. City of Berkeley*, 38 Cal. 4th 1, 15 (2006).

In *Clark v. County of Placer*, 923 F. Supp. 1278, 1287-89 (E.D. Cal. 1996), the county required participants in an automobile race to sign waivers giving up their rights to sue under Section 1983. Participation in such a race could only be considered a wholly discretionary benefit which the government was under no obligation to give. Nevertheless, the district court, applying the *Davies* balancing test, found that the waiver was an unconstitutional condition. So, too, in *La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243 (E.D. Cal. 1994), the court observed that the benefit at issue was wholly discretionary, but "the fact that the Government need not provide a benefit does not mean that it can condition receipt of that benefit unlawfully." *Id.* at 1249.

Thus even government privileges to which a citizen is not legally entitled cannot be employed as tools to force that citizen to waive constitutional rights. Such waivers are subject to the same balancing test set forth in *Davies* and *Lynch*, which weighs the voluntariness as well as the benefits and burdens on important public interests from enforcing the waiver. Since the NIA provision waiving the right to sue imposes significant burdens on essential constitutional rights to democratic participation, and serves no valid public purpose, it cannot satisfy the applicable test and is unenforceable.

C. Even if the NIA Waiver Provision Were Not Per Se Unenforceable, the Griswolds Signed This NIA Under Duress

Waivers of the right to sue must be regarded skeptically because they are prone to abuse by parties standing in an unequal bargaining position with others. Courts should guard against the possibility that government will bring extreme pressure on individuals, forcing them to waive their constitutional rights.

The City enjoys coercive authority, practically unlimited resources, and the power to delay permit applications. For it to require the Griswolds to waive their right to sue by imposing an illegal assessment on them and then offering the waiver as an "alternative" is the very archetype of unfair bargaining.

Although it involved no constitutional claims, *Pearlstein v. Scudder & German*, 429 F.2d 1136 (2d Cir. 1970), is instructive here. A customer sued a broker for violating securities laws, but the broker claimed the case was barred by the terms of a stipulation which resolved a previous lawsuit by the same customer against the broker. The court found that the stipulation was not a true meeting of the minds; the plaintiff was forced to sign by financial pressure that the *defendant himself had caused through his illegal conduct*. *Id.* at 1142-43. Moreover, enforcing the stipulation would contravene public policy by creating an incentive for brokers to violate the law, fend off lawsuits with settlements allowing further violations, and then proceed as before. *See id.* at 1143. Precisely the same analysis applies here. It was the financial pressure caused by the City's illegal assessment of $114,979 that induced the Griswolds to sign the NIA. Enforcing the waiver provision would contravene public policy by allowing the City to continue violating the California Constitution, and create an incentive for the City to impose

illegal assessments on their homeowners, and then offer them the alternative of signing the NIA, thereby waiving their right to sue, so that it can proceed as before.

Moreover, the evidence shows that although the City invited the Griswolds to negotiate the NIA's terms, and they attempted in good faith to do so, it later revoked that invitation and compelled them to sign the prewritten document unchanged. Mr. Griswold noted when signing: "I am unable to participate in any fashion in the drafting of the Neighborhood Improvement Agreement . . . . [M]y wife and I are now forced to sign [it] and submit it to the City in order that we may be granted a building permit." ER 2:093. Thus the waiver was practically a unilateral act by the City—a far more powerful party than an individual homeowner—which offered the NIA on a "take it or leave it" basis.

In *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007), this Court found certain arbitration agreements to be unenforceable where customers were "presented . . . with take-it-or-leave-it standardized contracts, which [the business] had prepared, forcing customers who would not accept a class action waiver to not extend their [contracts]," and where the business "had substantially greater bargaining power as a large, sophisticated corporation." *Id.* at 984. The same analysis applies to the NIA. Even aside from the fact that it fails the balancing test for judging the validity of waivers, it is an unenforceable contract of adhesion between dramatically unequal parties.

Finally, in addition to these unequal and improper negotiation procedures, the NIA also is substantively unconscionable. It seeks to insulate the City from any liability for its violations of the State Constitution. *Cf. id.* at 986. The City's efforts to contravene the express terms of the State Constitution, and to extract a waiver of the right to sue—all through the heavy-handed tactic of imposing illegal six-figure assessments on homeowners and offering the NIA as an "alternative"—shocks the judicial conscience, and cannot be enforced.

II. THE GRISWOLDS ARE NOT ESTOPPED FROM CHALLENGING THE VOTING RIGHTS WAIVER

The City's contention that the Griswolds are barred from challenging the conditions of their permit because they renovated their property also must fail. That argument is rooted in principles of equitable estoppel, but equitable estoppel cannot apply here for three reasons. First, the NIA is illegal and contrary to fundamental public policy, and estoppel cannot be used to enforce unconstitutional conditions in a contract. Second, although the City at first invited the Griswolds to negotiate over the terms in the NIA, they were eventually compelled to sign it as-is, meaning that the NIA is an adhesive document that does not reflect any true meeting of the minds. Finally, the City cannot show that it was prejudiced in any significant way by relying on the Griswolds' signature. Indeed, the only "prejudice" the City claims to have suffered is that this lawsuit might burden its ability to evade the language of the California Constitution. That is not the sort of prejudice needed to support an estoppel argument.

A. Estoppel Cannot Allow the City to Escape Its Constitutional Obligations

No federal court has ever held that a party is barred from challenging violations of fundamental civil rights simply because the party received a "benefit" in "exchange" for that deprivation. Although the Supreme Court once held that plaintiffs are barred from challenging conditions on benefits that they receive, *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947), it later considerably narrowed this so-called "constitutional estoppel" rule, holding that it only applies to plaintiffs, such as corporations, which owe their very existence to the statutes they challenge. In *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 456-57 (1988), the Court observed, in language equally applicable to the Griswolds, that "Appellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *Accord*, *United States v. City & County of San Francisco*, 310 U.S. 16, 28-30 (1940); *Arnett v. Kennedy*, 416 U.S. 134, 152-53 (1974); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 909 (7th Cir. 2003).

A party who retains the benefits of a contract or a government permit is normally estopped from challenging the conditions in that contract or permit while retaining its benefits. But that rule applies only to *legal* contractual conditions. *See, e.g.*, *Kaneb Servs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 650 F.2d 78, 81-82 (5th Cir. 1981); *Navajo Refining Co., L.P. v. United States*, 58 Fed. Cl. 200, 212-15 (Fed. Cl. 2003). Estoppel cannot apply where the conditions are *illegal* and intrude on "dominant public interest[s]." *Steele v. Drummond*, 275 U.S. 199, 205 (1927) (emphasis added).

Here, the condition is unconstitutional and contravenes a public interest of the highest order: that of democratic participation. Article XIIID of the California Constitution provides the sole and exclusive method for levying property assessments in the state. *Barratt Am.*, 117 Cal. App. 4th at 817-18. The NIA scheme is an attempt to create an illegal alternative. The City therefore cannot ask for the protections of equity, including estoppel. On the contrary, the equities weigh in favor of protecting democratic participatory rights. To estop the Griswolds from challenging the NIA scheme would enable the City to violate essential public policy. "Estoppel is an equitable doctrine, and it should not be lightly imposed to deprive a person of the right to challenge the legality of government action." *Chesapeake & Ohio Ry. Co. v. United States*, 392 F. Supp. 358, 365 (D.C. Va. 1975), *rev'd on other grounds*, 426 U.S. 500 (1976).

To estop the Griswolds would "wholly deprive the public of the safeguards which the law intended for their protection in limiting and defining the powers of their public servants." *State v. Town of Monroe*, 82 P. 888, 889 (Wash. 1905). Although estoppel may enforce contracts that contain technical defects, it cannot enforce a contract "where the power to act in the first instance was entirely lacking." *Id.* In *Navajo Refining*, 58 Fed. Cl. at 212-15, the Court of Claims rejected the government's argument that a contracting party was barred from challenging the legality of certain provisions of a contract. *Id.* at 212. Even though the contract had been in place for seventeen years without objection, the court refused to apply a waiver doctrine given that the government refused to negotiate over the illegal term, but insisted on including that term. *See id.* at 214. So, too, in this case, the government insisted on including an illegal contractual term from which it benefits—and equity cannot entitle the government

to a waiver defense. Thus it is irrelevant that the Griswolds may retain the "benefit" of their building permit: "[O]ne party frequently retains the benefit of an illegal contract. Unjust enrichment alone is an insufficient reason for the courts to assist in the enforcement of an illegal agreement." *Evans v. Luster*, 928 P.2d 455, 458-59 (Wash. Ct. App. 1996).

B. The NIA Was an Adhesive, Take-It-Or-Leave-It Document, and Not an Agreement of Mutual Estoppel

Estoppel can apply only where the parties willingly place themselves under mutual obligations. *Smith v. Rasqui*, 176 Cal. App. 2d 514, 519 (1959) ("[T]he estoppel must be mutual and reciprocal and . . . either both parties must be bound or neither party is bound."). As described above, the NIA was an adhesive contract over which the Griswolds were not allowed to bargain, and which they were compelled to sign due to financial pressures illegally imposed by the City. It therefore lacks the necessary element of mutuality, and equitable estoppel cannot apply.

C. The City Cannot Show That It Was Prejudiced by the Griswolds' Actions Under the Permit

"[T]he doctrine of estoppel as applied to the right to question the constitutionality of a statute or the benefit of a constitutional right is not applied solely on technicalities, but must rest on substantial grounds of prejudice or change of position." *Morgan v. Thomas*, 321 F. Supp. 565, 584 (D.C. Miss. 1970), *rev'd on other grounds*, 448 F.2d 1356 (5th Cir. 1971). But the City cannot show that it was prejudiced by the Griswolds.

Although the City granted the building permit, the only ground on which it might have refused was the Griswolds' failure to immediately pay the assessment. That assessment was illegal, because assessments may not be levied except after an Article XIIID election. To invoke estoppel, a party must show prejudice to a right *to which it is legally entitled*. *Kaufman v. Mellon Nat'l Bank & Trust Co.*, 366 F.2d 326, 333 (3d Cir. 1966). Here, the only "prejudice" to the City is to deprive it of the opportunity to pursue an unconstitutional assessment policy. "The very purpose of estoppel would be contradicted if it could be applied to protect those whose only claim of prejudice was interference with their ability to commit an illegal act." *Individual Members of Mishawaka Fire Dep't v. City of Mishawaka*, 355 N.E.2d 447, 449-50 (Ind. Ct. App. 1976). No legal right of the City was prejudiced by the Griswolds, and estoppel cannot apply.

III. NO IMPLIED WAIVER RULE IS APPLICABLE TO THIS CASE

A. This Court Should Not Adopt a Rule Forcing Homeowners to Choose Between Vindicating Their Rights and Constructing Needed Improvements

There is no federal rule barring a person from challenging the constitutionality of a condition imposed on a building permit after completing construction. Nor should this Court create one. Such a rule

would impose serious burdens on homeowners by forcing them to choose between forgoing needed improvements pending the outcome of a long and expensive lawsuit, or acquiescing in unconstitutional conditions.

Creating an implied waiver rule would have deleterious policy consequences. Since many homeowners cannot afford the time and expense of delaying needed improvements to await the outcome of a lawsuit and appeals, they would be far more likely to acquiesce in unconstitutional infringements on their rights. Thus "the only developers who [could] contest onerous conditions in their land-use permits [would be] those who are well-heeled enough to put their projects on hold while they appeal." Paul D. Wilson, *Nasty Motives Visit the Supreme Court: A Consideration of Recent Land-Use Damages Cases*, 32 Urb. Law. 787, 810-11 (2000). Others would be subjected to intense economic pressure to surrender their fundamental rights—precisely what the Griswolds complain of here. Such a rule also would encourage delay in cases involving *legitimate* conditions, since many developers would hold off construction while litigating and appealing those challenges—thus imposing unnecessary costs on local governments.

For these reasons, the Texas Supreme Court chose to reject such a rule in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004) ("[S]uch a standard would pressure landowners to accept the government's conditions rather than suffer the delay in a development plan that litigation would necessitate."). It noted that some states have statutes requiring landowners to choose between constructing pursuant to a permit and challenging the conditions of that permit, and these statutes are the result of legislative deliberation in which representatives weighed the costs and benefits associated with that rule. *See id.* It would be improper for the judiciary to engage in this sort of lawmaking. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002) (where a rule "would render routine government processes prohibitively expensive or encourage hasty decisionmaking[, s]uch an important change in the law should be the product of legislative rulemaking rather than adjudication").

These policy considerations are even more applicable here than in a regulatory takings case, since the violation of the Griswolds' right to vote cannot be remedied by the payment of just compensation. Burdening their ability to vindicate their fundamental rights—by requiring them to delay constructing needed improvements in order to await the outcome of a court challenge—would be inappropriate.

B. State Rules Barring Property Owners from Seeking Compensation for Permit Conditions Are Inapplicable Where the Owner Challenges the Constitutional Legitimacy of the Conditions

Even if state law did apply, the Griswolds' construction would not bar their lawsuit. California state courts have held that plaintiffs cannot bring *regulatory takings* challenges against otherwise valid permit conditions after building, *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 76 (1977), but they have not barred plaintiffs from challenging illegal conditions. On the contrary, in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914 (1985), the Court of Appeal refused to enforce a waiver similar to the NIA. There, a group of landowners sued for damage to their property after they

accepted building permits conditioned on waivers of the right to sue. *See id.* at 940. The court found that although landowners who accept and comply with the conditions of building permits are generally barred from suing "for inverse condemnation for the cost of compliance," *id.* at 941, they are *not* barred from seeking invalidation of "an unlawful agreement which is contrary to public policy and . . . void *ab initio*." *Id.* To enforce the condition simply because the owners built under the permit "would entail requiring the court to uphold an unlawful agreement, a result disfavored." *Id.*

Like the *Salton Bay* plaintiffs, the Griswolds are not "su[ing] the issuing public entity for inverse condemnation for the cost of compliance," *id.* at 941, or trying to "forc[e] an unwanted taking of property by the public entity and concomitant burden of compensation." *Id.* Instead, they are challenging the legality of a condition that they contend is void *ab initio*. Thus even under state law, the Griswolds cannot be barred from challenging the legality of the NIA.

CONCLUSION

The Griswolds can no more be barred from challenging the constitutionality of the City's illegal activities than a homeowner could be barred from challenging a long-standing, unconstitutional land use restriction like that in *Shelley v. Kraemer*, 334 U.S. 1 (1948), simply because he somehow "enjoyed the benefits" of the property. No principle of waiver or estoppel bars the Griswolds from challenging the constitutionality of the NIA waiver scheme. The explicit waiver of the right to sue in the NIA itself is unenforceable as an unconscionable, adhesive contract, and the City cannot appeal to principles of equity. Nor is there any federal rule which holds that constructing pursuant to a permit implies any waiver of the right to challenge the constitutionality of permit conditions. While a similar rule applies in state court regulatory takings cases, that rule is not applicable to this federal nontakings case challenging a void permit condition. This Court should not adopt a waiver rule which would impose serious burdens on homeowners' fundamental rights. Instead, it should reverse the decision below.

Respectfully submitted,

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By s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Plaintiffs and Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Timothy Sandefur
TIMOTHY SANDEFUR