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August 9, 2019

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Eisen v. Tavangarian* (No. S257181)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Marquez Knolls Property Owners Association, Inc., joined by the Pacific Palisades Residents Association, Inc. and Castellammare Mesa Home Owners, urge the Court to grant review of the Court of Appeal's published opinion in *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626. *Eisen* creates enormous uncertainty not only for homeowners in the Marquez Knolls neighborhood but for homeowners across the state, and if allowed to stand, will have negative economic consequences across California.[1]

As discussed below, *Eisen* holds that a Court of Appeal can disregard existing precedent and upend a rule of property—that homeowners and others have relied upon in making some of the biggest economic decisions

[1] The authors of this letter represents the Marquez Knolls Property Owners Association, Inc. The Pacific Palisades Residents Association, Inc. and Castellammare Mesa Home Owners have independently chosen to join this letter.

in their lives—simply based on a change in court composition and a newfound belief that a previous decision was mistaken. This Court should grant review to clarify what circumstances justify a departure from stare decisis in a case involving real property, as well as the two additional issues raised by the Eisens in their petition for review.

I. Background

The Court of Appeal in *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626 examined covenants, conditions, and restrictions ("CC&Rs") applicable to two neighbors in the Marquez Knolls community in Pacific Palisades. Nearly 15 years earlier, the same division (Division Seven) of the Second District had examined the same key paragraph of the CC&Rs, paragraph 11, which states: "No fences or hedges exceeding three feet in height shall be erected or permitted to remain between the street and the front set-back line nor shall any tree, shrub or other landscaping be planted *or any structures erected that may at present or in the future obstruct the view from any other lot*, and the right of entry is reserved by the Declarants to trim any tree obstructing the view of any lot." (*Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 622 (*Zabrucky*), italics added.)

Focusing on the phrase "or any structures erected," the Court of Appeal in *Zabrucky* held that the interpretation that was most "logical and supportable," "'just and fair,'" and best reflected the intent of the original drafters, was that paragraph 11 prohibits a homeowner from remodeling his home in a way that "unreasonably obstructed" the views from neighboring properties. (*Id.* at pp. 624, 628–629.)

This was a critically important ruling to homeowners, as *Zabrucky* recognized, because "much of the value of any property within" Marquez

Knolls "depends on the quality of the view" and "[t]o significantly obstruct any homeowner's view of the Pacific Ocean is to depreciate the economic worth of their property—often by [then] several hundred thousand dollars—as well as dramatically reduce their enjoyment of the home they bought and live in." (*Id.* at pp. 623–624.)

Justice Dennis M. Perluss dissented in *Zabrucky*, despite recognizing that "the majority ha[d] fashioned a practical and fair resolution of" the question presented that led to a "sensible" rule and an "evenhanded result." (*Id.* at pp. 629–630.) Justice Perluss contended that the phrase "any structures erected" in paragraph 11 referred to structures other than an already existing house because (1) the paragraph uses the term "erected" instead of "altering," whereas other paragraphs in the CC&Rs refer to "altering" the home itself; and (2) the doctrine of "noscitur a sociis (it is known by its associates)" indicates that "'structures' in this paragraph is properly limited to landscaping or other outdoor items separated from the residence itself—gazebos, trellises, carriage or pool houses." (*Id.* at pp. 631–632.)

Nearly 15 years later, Division Seven of the Second Appellate District had the occasion to consider paragraph 11 yet again, after the trial court determined that a remodel by a developer (Tavangarian) had "unreasonably obstructed" the views of a nearby neighbor, the Eisens, in violation of paragraph 11. This time, as Presiding Justice and writing for the court, Justice Perluss adopted in full his *Zabrucky* dissent: "'structures' in [paragraph 11] is properly limited to outbuildings or similar objects surrounding the dwelling house, rather than improvements to the residence itself." (*Eisen*, *supra*, 36 Cal.App.5th at p. 645.) In addition to relying on noscitur a sociis and the distinction between "erected" and "altering," Justice Perluss reasoned that an interpretation

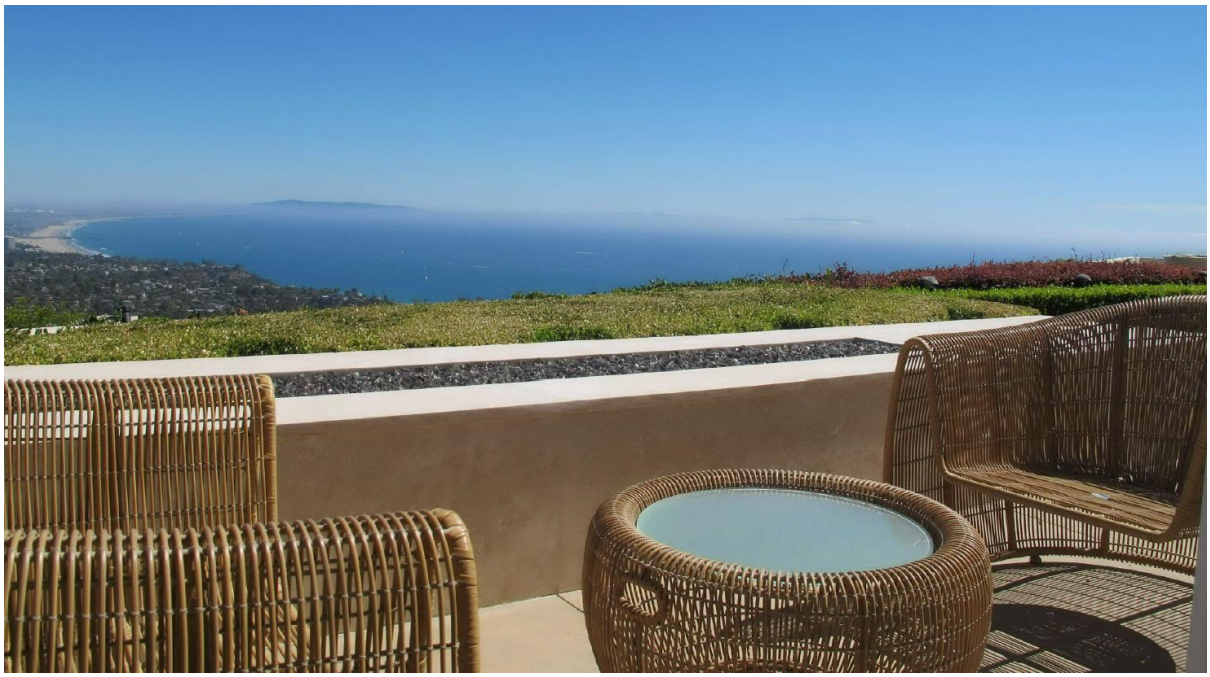
against view protection "furthers the public policy in favor of the free use of land." (*Id.* at pp. 637, 643–646.)

Recognizing the issue had already been decided in *Zabrucky*, the Court of Appeal held that it was "free to reconsider one of [its] prior decisions and conclude it was mistaken." (*Id.* at p. 637.) *Eisen* concluded that it could do so even though the party (Tavangarian) asking the court to "adopt the reasoning of the *Zabrucky* dissent" agreed in the trial court that *Zabrucky* supplied the relevant rule of decision, and therefore raised no challenge to *Zabrucky* until the appeal. (*Id.* at pp. 636–637.)

II. Interest of The Marquez Knolls Property Owners Association and Other Concerned Amici

The Marquez Knolls Property Owners Association, Pacific Palisades Residents Association, Inc., and Castellammare Mesa Home Owners are interested in this Court's review of *Eisen* because they value and depend on stability and predictability in property law.

The Marquez Knolls Property Owners Association is a non-profit corporation that represents the interests of over 1,200 homeowners who live in the Marquez Knolls area. Marquez Knolls is a neighborhood in Pacific Palisades with spectacular views of the city, hills, and the "Queen's Necklace"—the curved coastline extending from Malibu to Palos Verdes Peninsula:



As described below, many of the association's homeowners relied on *Zabrucky* when they made some of the biggest financial decisions of their lives, including whether to buy, remodel, or remain in their homes. Indeed, the association submitted an amicus curiae brief in *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, which the Court of Appeal approvingly discussed in its opinion, precisely because of the importance to the community of the continued enforcement of the CC&Rs.

By disregarding *Zabrucky*, the *Eisen* decision creates substantial uncertainty for the association's homeowners, not only in terms of their ability to rely on a rule of law once it has been announced, but also in terms of the financial ramifications that uncertainty and unpredictability in property law creates. As described below, stability in the law is of utmost importance to homeowners and to the real estate market in general. We therefore urge this Court to articulate a clear standard

regarding when it is appropriate for an appellate court to depart from stare decisis.

The Pacific Palisades Residents Association, Inc. also joins in this call for stability in the law. It is a non-profit corporation whose mission is to protect and preserve the neighborhoods and the coastal and mountain environment of Pacific Palisades and surrounding areas, and to educate its members, the community, and elected officials on issues which affect the environment and quality of life in Pacific Palisades, the Los Angeles Basin, and California.

The Castellammare Mesa Home Owners organization also joins in the chorus for stability in the law. It is a non-profit corporation that represents the owners of approximately 200 homes in a nearby neighborhood of Pacific Palisades, and whose primary responsibility is to uphold the CC&Rs governing its community.

III. Why This Court Should Grant Review

The *Eisen* decision creates enormous uncertainty for homeowners in the Marquez Knolls neighborhood and across the state, and the real estate market in general. This Court should grant review to clarify the appropriate role of stare decisis in property cases for at least three reasons.

First, there is significant confusion over the strength of stare decisis in real estate cases. On one end of the spectrum is this Court's guidance from *Sacramento Bank v. Alcorn* (1898) 121 Cal. 379 and *Sorenson v. Hall* (1934) 219 Cal. 680. In *Sacramento Bank*, the Court held that once a court's decision has "become a rule of property," no matter how "thoroughly [the Court] might now be convinced that the rule is erroneous,

it should not be disturbed." (121 Cal. at p. 382.) According to this Court, "[r]uin and injustice would result from" revisiting a decision that "many people have invested their money relying upon." (*Ibid.*) And in *Sorenson*, this Court remarked that it doubted "the appellants [we]re serious in their contention that the[past] decisions of the court should now be overruled and set aside after the many years which they have stood as containing a correct declaration and exposition of the law" and have "become a rule of property upon which rests the validity of the title to thousands of pieces of real property in this state of incalculable value." (219 Cal. at p. 683.)

On the other end of the spectrum is *Eisen*: a Court of Appeal can upend a decision that homeowners have financially relied upon, even if the decision was, according to its *critic*, "practical," "fair," "sensible," and "evenhanded." Put differently, *Zabrucky* could be set aside for no reason other than a belief the previous court "misread paragraph 11." (*Eisen*, *supra*, 36 Cal.App.5th at p. 643.)

And in the middle are a number of authorities, including from this Court, that stare decisis "weighs heavily" in property cases. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 1000 ["Perhaps more than in any other situation, courts are inclined to follow precedent when property rights have been founded and vested in accord with an existing rule."]; see also, e.g., *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 381 ["Substantive rules governing the law of real property are peculiarly subject to the principle of stare decisis."]; 9 Witkin, California Procedure (5th ed. 2008) Stare Decisis is Applicable, § 513 [explaining that "[p]robably the strongest of the considerations that influence courts to follow precedent is that property rights have been founded and become vested in accordance with the rule laid down," but indicating that it is not decisive in all cases].)

As articulated by the Court in *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, a rule of property "should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one" *except* "for the *most cogent reasons*, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error." (*Id.* at pp. 456–457, italics added.)

This Court's guidance is necessary to clarify the appropriate standard, and amici urge it to adopt a middle ground that appropriately recognizes that many people have invested their life-savings in reliance on stability in the interpretation of rules of property, including CC&Rs.

Second, the role of stare decisis in property cases presents an important question of law that affects property owners across the state. As you have heard and will continue to hear from individual members of the Marquez Knolls community, the *Eisen* decision has rippled through the community. Homeowners such as George M. Rosenberg have written to the Court to explain firsthand how he relied on CC&Rs in making the biggest investment of his life, the purchase of his home, and relied on *Zabrucky*'s upholding of the CC&Rs, when he spent well over $1 million to remodel his home. Until the *Eisen* decision, Mr. Rosenberg felt that his investments were protected. Now he fears his house is worth significantly less than it was just a day before the *Eisen* decision.

But the uncertainty *Eisen* creates is not limited to the Marquez Knolls community. Rather, because the Court of Appeal exhibited a willingness in that case to overturn a "fair" and "sensible" opinion based on nothing more than a change in court composition and a different approach to the textual analysis, homeowners across the state must now question whether

they can continue to rely on CC&Rs that are integral to the value of their homes.

Finally, if the *Eisen* decision remains the law—and thus the Courts of Appeal are free to disregard, without any limits, existing precedent in property cases—the real estate market as a whole will suffer.

Overturning previously-established rules requires individuals and businesses to incur costs to alter "practices that they had adopted and are following in reliance on the law before it changed." (Richard Posner, Economic Analysis of the Law § 21.4 (9th ed. 2014).) For example, depreciation in land value can destabilize loans secured against the property, and can force people out of their homes or otherwise reallocate their resources.

Transaction costs will also rise because if parties "perceive that they cannot rely conclusively on the validity of case-law rules of title, then they w[ill] undertake additional precautions aimed at clarifying the strength of the title passed to a potential seller." (Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent* (2000) 78 N.C. L.Rev. 643, 663.) For example, potential buyers might "entertain a lawsuit to establish the validity of" their CC&Rs or require a guarantee from the seller. (Epstein, *Notice and Freedom of Contract in the Law of Servitudes* (1982) 55 S. Cal. L.Rev. 1353, 1363.) And because those measures increase the cost of the bargain, some otherwise economically beneficial transactions will not take place. (Lee, *Stare Decisis*, *supra* at p. 663.)

IV. Conclusion

Amici urge the Court to grant review and provide guidance on the correct role stare decisis should play in real property cases. As this Court has recognized, "[i]t is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.'" (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d, 287, 296.) This Court should restore these bedrock principles by granting review of *Eisen* and make clear that a Court of Appeal cannot disregard long-standing precedent that citizens have relied on simply because the court now disagrees with its prior reasoning.

Sincerely,

/s/ *Theane Evangelis*
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PROOF OF SERVICE

I, Jeremy S. Smith, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. On August 9, 2019, I served the following document(s):

LETTER FROM THEANE EVANGELIS DATED AUGUST 9, 2019

on the parties stated below, by the following means of service:

☒ **BY ELECTRONIC SERVICE**: I caused a copy of the attached document to be electronically served through TrueFiling, unless otherwise indicated on the service list.

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☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9, 2019.

Jeremy S. Smith