No. 15-330

In The
Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE, CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FOR THE SUPREME COURT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This Court has made clear that the Takings Clause of the Fifth Amendment prevents public authorities from conditioning a permit approval on a requirement to dedicate an interest in real property (or money) to the public, unless the authorities can demonstrate that the exaction bears a nexus to some adverse impact that the proposed project may have on the public, and is roughly proportional. *Koontz v. St. Johns River Management District*, 133 S.Ct. 2586 (2013). The questions presented here are:

1. Would it be a taking for a municipality to require that 15 percent of all newly-constructed residential property be donated for use as the city's stock of affordable housing, by means of an encumbrance running with the land which prohibits the property from being sold at fair market value for up to 55 years?

2. Are legislatively-imposed requirements—which would be unconstitutional if imposed by an agency—exempt from the nexus and rough proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586 (2013)?

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The Owners' Counsel of America ("OCA") is an invitation-only network of the nation's most

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[1] Counsels of record have consented to the filing of this brief. *Amici* gave timely notice of their intention to file in this matter and have provided the parties with an electronic copy of this filing. In accordance with Rule 37.6, *amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

experienced eminent domain and property rights attorneys. As the lawyers on the front line of property law, they have joined together to advance, preserve, and defend the constitutional rights of private property owners. In doing so, OCA furthers the cause of liberty, because the right to own and use property is the guardian of every other right and the basis of a free society.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. NFIB Legal Center and OCA file here out of concern that legislative bodies will continue enacting laws forcing landowners to waive constitutional rights, as a condition of obtaining necessary permit approvals, until this Court clarifies that legislative exactions are subject to review under the nexus and rough proportionality tests.

SUMMARY OF ARGUMENT

The fundamental reality, which the California Supreme Court avoided, is that San Jose is not simply regulating Petitioner's property, but has affirmatively pressed it into public service to alleviate the city's critical need for below-market housing. But, before forcing homebuilders to choose between (a) their fundamental right to just compensation and (b) their fundamental right to develop and use their property, the City is supposed to show that the builders are directly causing the City's skewed housing market, and that market-prices are not the product of greater economic (or regulatory) forces—say, the neo-forty-niners whose

rush on Silicon Valley has outpaced the ability of homebuilders, in California's highly restrictive regulatory climate, to meet the overwhelming, and insatiable, demands of the tech industry.[2] This constitutional requirement applies equally when a legislature imposes a demand for dedication of any property interest because the same extortion-prevention rationale applies: the permitting process should not be leveraged as an opportunity for government to get "goodies," and should only be utilized as a means to ensure that those who are exercising their property rights mitigate any impacts for which they are responsible. *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

The California court, however, held that the unconstitutional conditions doctrine doesn't apply, because the requirement that developers encumber title on newly constructed homes by artificially lowering the sales price for up to 55 years—the functional equivalent of a negative easement—does not fit the definition of an "exaction" because there is no express demand to turn over land, or money in lieu of land. Under this view, the requirement that homebuilders provide affordable housing is just another restriction on the use of property akin to a zoning ordinance, and thus subject only to rational basis review—not the more demanding standards of

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[2] Even the San Francisco 49ers have moved to the Santa Clara Valley. *See* Ann Killion, *49ers move angers many longtime fans*, San Francisco Chronicle (Feb. 13, 2015), *available at* http://www.sfgate.com/49ers/article/49ers-move-angers-many-longtime-fans-4277145.php.

Nollan, *Dolan*, and *Koontz*. But, the city has forced a constitutionally repugnant choice upon Petitioners, which this Court's decisions expressly forbid.

The city's requirement forces owners into the same unconstitutional dilemma which faced James and Marilyn Nollan, Florence Dolan, Coy Koontz, and Marvin and Laura Horne: you are prohibited from making use of your property unless you first surrender your rights by agreeing to sell it for less than its fair market value. Additionally, the California court forgot that substance is more important than form, and joined with a number of lower courts which give legislatively-imposed demands a rational basis pass when the very same requirements would be subject to *Nollan*, *Dolan*, and *Koontz* if imposed during the permitting process. In the court's view, as long as the extortion is systematic, it is of no constitutional moment; the more pervasive the offense, the lesser the review. This not only contravenes the unconstitutional conditions doctrine—which has always applied equally to legislative enactments—but affirmatively conflicts with *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), which emphasized that the takings inquiry focuses on the burden imposed on the property owner, not the identity of the regulator. And it is no answer for the city to argue that the gears of government will grind to a halt should this Court affirm bedrock constitutional principles; the sky will not fall if this Court continues to require what the Constitution demands.

Here is an opportunity for the Court to clarify that legislatively imposed exactions are subject to

review under unconstitutional conditions doctrine—because an "out-and-out plan of extortion" is just as repugnant when imposed by legislation as when carried out by an agency. Over the years, California courts adopting outlier arguments have provided fertile ground for development of this Court's takings doctrine. *See*, *e.g.*, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *First English Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304 (1987); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There's no reason to believe the California court got it right this time, either.

ARGUMENT

I. THE DECISION OF THE CALIFORNIA SUPREME COURT DEMONSTRATES A COMPELLING NEED FOR CLARIFICATION OF FUNDAMENTAL DOCTRINAL PRINCIPLES UNDER THE TAKINGS CLAUSE

Increasingly, permitting authorities have sought to dress exactions up as mere "regulatory restrictions." *See e.g.*, *Powell v. County of Humboldt*, 222 Cal.App.4th 1424, 1435-41 (2014) (exacting an aviation easement that prohibited specified conduct, as a condition of approval to make modest changes to a family home); *see also* Katy Grimes, California

Coastal Commission Keeps Grabbing Land, CalWatchdog.com (recounting the story of Dan and Denise Sterling who were told that they could not obtain a permit to build a home unless they were willing to record an easement that would have required them to farm 140 acres of their property in perpetuity).[3] Authorities seek to gain concrete public benefits in recording encumbrances limiting those rights that may be transferred with title to a property, while aiming to avoid the heightened scrutiny that this Court requires in exactions cases. *See Smith v. Town of Mendon*, 822 N.E.2d 1214, 1225 (2004) (Read, J., dissenting) (expressing bewilderment that the majority opinion refused to apply *Nollan* and *Dolan* in review of an exaction requiring the recording of a "development restriction"—despite the fact that the municipal authority had conceded it was exacting "a conservation easement"). Thus, a recurrent question of fundamental concern to landowners throughout the nation is whether the nexus and rough proportionality tests, set forth in *Nollan* and *Dolan*, apply when land use authorities engage in this sort of conduct.

This issue is of growing concern for developers, and ordinary landowners, who are often forced to choose between attaining necessary government approvals and acceding to extortionate demands to record restrictions forever limiting prospective uses—therein conferring upon the public an enforceable right to enjoin specified uses that the

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[3] *Available* online at http://calwatchdog.com/2012/10/23/california-coastal-commission-keeps-grabbing-land/ (last visited Oct. 1, 2015).

owner would otherwise be free to engage at common law. These conditions inevitably seek to attain some ostensible public benefit. In this case San Jose has conditioned permit approvals on a requirement to record an encumbrance limiting future resale values, so as to annex the property into the City's portfolio of affordable housing units available to the public. San Jose Municipal Code §§5.08.400(A)(a); 5.08.600(A)-(B). But outside the context of inclusionary zoning regimes, the issue often arises with permit conditions requiring the recording of restrictions to preserve open-space for the benefit of the greater community, or for the recording of a conservation easement. *See e.g., Town of Mendon*, 822 N.E.2d at 1217-18; *Lynch v. California Coastal Comm.*, 177 Cal.Rptr.3d 654, 675 (2014) (Nares, J., dissenting) (arguing that imposed permit conditions unconstitutionally required waiver of the owner's "present and future rights to protect their homes, as guaranteed to them by [] … the California Constitution.").

Here the California Supreme Court sided with the New York Court of Appeals, and a growing number of other jurisdictions, in holding *Nollan* and *Dolan* inapplicable in review of conditions requiring dedication of an encumbrance limiting future uses. *San Jose*, 61 Cal. at 461; *Town of Mendon*, 822 N.E.2d at 1217-18. The Court reasoned that that *Nollan* and *Dolan* only apply if it may be said that the imposed condition would amount to a *per se* taking, had the authorities directly appropriated the property in question outside the permitting context. *Id.* at 459-60. That restatement is accurate enough. But the question dividing the lower courts is

whether an outright appropriation of an encumbrance triggers a *categorical duty* to pay just compensation if it merely limits *permissible uses* of the subject property? *Compare Ocean IV Homeowners Ass'n Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001) (suggesting that the nexus and rough proportionality tests are only applicable in review of a requirement for dedication of real property); *with Hardesty v. State Roads Comm'n of State Highway Admin.*, 276 Md. 25, 35, 343 A.2d 884, 890 (1975) (holding a condemning authority took a "scenic easement"). Accordingly, this Court should grant *certiorari* to resolve this recurrent question, and to affirm the categorical rule that just compensation is required any time public authorities appropriate an easement, servitude or other such encumbrance over private property—regardless of whether the recorded restriction merely seeks to control future uses.

A. This Court Holds that the Outright Appropriation of an Interest in Real Property Constitutes a *Per Se* Taking

Our takings jurisprudence begins and ends with the proposition that government must pay for any property interest that it appropriates whether by physical invasion or by force of law. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (holding that government must pay the "full and perfect equivalent" of any property interest taken—in that case the privilege of engaging in conduct to generate revenue from the condemned property). Usually the difficulty is in

determining whether a regulatory restriction goes so far as to amount to a taking. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). But there can be no question that the outright appropriation of an interest in real property constitutes a *per se* taking. *See Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179-80 (1871); *Lingle*, 544 U.S. at 528. Indeed, *United States v. General Motors Corp.* made clear that a regulatory act purporting to encumber title to a property is necessarily an exercise of the state's eminent domain powers. 323 U.S. 373, 378-79 (1945) (emphasizing that the Takings Clause requires compensation for the taking of any property interest including the rights to "possess, use and dispose of [real estate][,]" and affirming that "the compensation to be paid is the value of the interest taken."); *see also United States v. Clarke*, 445 U.S. 253, 257 (1980) (explaining the public duty to pay just compensation is self-executing).[4]

To illustrate the point, a landowner holding a fee simple absolute title maintains total—unencumbered—ownership of his property, and may thus put the land to any reasonable use.[5] Thus, at common law, his neighbors have no right to exert

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[4] In addition to the right to exclude, property owners possess a fundamental right to participate in the market without having to surrender their constitutional rights. *See Horne v. U.S. Dep't. of Agriculture*, 35 S.Ct. 2419 (2015). Were San Jose to simply force owners to dedicate land, surrender money, or encumber their homes with recorded restrictions prohibiting sale at fair market values, there would be no question the Fifth Amendment would require the City to pay compensation.

[5] *See* William Blackstone, 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P. 41 (1959).

any degree of control over the land. *See e.g.*, *J.F. Giooa, Inc. v. Cardinal Am. Corp.*, 23 Ohio App. 3d 33, 37 (1985) (explaining that a party asserting a right to use another's property bears the burden of establishing acquisition of rights). If someone wants to acquire a *right of control*, they must negotiate an agreement for conveyance of an easement, or negative servitude, restricting future uses of the estate. Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 Tex.L.Rev. 533, 536 (1988). For example, if I was concerned that my neighbor might eventually exercise his right to build on a currently undeveloped portion of land, I might attempt to strike a deal to foreclose the possibility of future development.[6]

Of course, the fee simple absolute owner might well refuse to agree to anything limiting prospective uses of the property, or might drive a hard-bargain because he is being asked to transfer valuable property rights. But public authorities are

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[6] There are many reasons why one might be willing to pay to acquire an easement, or servitude, restricting future development on a neighbor's land. One might seek to preserve unobstructed views over his neighbor's property for subjective reasons, or for legitimate business reasons. One might also wish to acquire a right to enjoin any future development on a neighboring parcel because, in preserving open-space on an adjoining lot, the dominant estate can ensure higher resale values. Or perhaps an avowed environmentalist might seek to acquire a conservation easement because he has a personal interest in preserving undeveloped land. *See* Jan G. Laitos and Catherine M.H. Keske, *The Right of Nonuse*, 25 J. Envtl. L. & Litig. 303, 367 (2010). But, in each case, the right to control what happens on a neighboring property comes at a price—and that's assuming the fee simple owner is willing to negotiate.

not limited to free market negotiations. When a public entity wishes to acquire an encumbrance it need not seek to strike a deal with the landowner, but may instead exercise its eminent domain powers to affirmatively compel the conveyance. *See Esgar Corp. v. C.R.R.*, 744 F.3d 648, 659 (10th Cir. 2014) (noting that courts require payment of "fair market value" should a condemning authority seek to extinguish a conservation easement). In such a case the landowner is entitled to just compensation, as a categorical matter, because the authority has taken an interest in the land—carving the encumbrance from the title, and leaving the owner with something less than a fee simple estate. *See Hardesty*, 276 Md. at 30 (explaining that a negative easement extinguishes "a portion of [the landowner's] property rights… [and] [t]he state obtains [] the right to enforce the negative easement through court action.") (quoting Comment, Progress and Problems in Wisconsin's Scenic and Conservation Easement Program, 1965 Wis.L.Rev. 352, 360 (1965)).

Thus, for example, when the City of Westerville, Ohio sought to permanently control landscaping—in a manner that would inhibit views to and from a commercial property—the Ohio courts properly concluded that the City was required to pay fair market value for a landscaping easement. *Westerville v. Taylor*, 2014-Ohio-3470, ¶¶32-34 (Oh. 10th Dist. 2014). But in the view of the California Supreme Court, Westerville could have outright appropriated a landscaping easement without incurring an obligation to pay anything because, after all, the municipality could achieve the same end by imposing mere regulatory restrictions subject

only to minimal rational basis review. *See San Jose*, 61 Cal. at 461. Yet this Court's recent decision in *Horne* underscores that *per se* takings liability still applies when the government outright takes a property interest—even if the authority could achieve its same goals by imposing regulatory restrictions. *Horne*, 135 S.Ct. at 2428 (2015) (noting a "settled difference in our takings jurisprudence between appropriation and regulation."). The decision below contravenes that rule—suggesting that there is room for calculating public entities to appropriate an interest in property without incurring an obligation to pay for what is taken.

i. An Imposed Requirement to Record a Restriction Limiting Prospective Uses Must be Reviewed More Stringently than a Normal Regulatory Restriction

No one doubts that the City retains the prerogative to impose generally applicable use restrictions pursuant to its delegated police powers. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). But, that proposition does not justify the assumption that municipal authorities may leverage those powers to force landowners into recording encumbrances limiting what rights may be transferred with future conveyances of title. This assumption is especially dubious in light of this Court's warning in *Koontz* that a heightened standard of review is necessary in exactions cases to prevent land use authorities from coercing owners into giving-up protected rights to attain permit approvals. *Koontz*, 133 S.Ct. at 2594. More

fundamentally, there is no basis for assuming that the same test should apply in review of an outright appropriation of an encumbrance—concretely limiting future uses for a property—as would apply if the authorities had sought to merely regulate current uses. *See Nollan*, 483 U.S. at 834-36; *United States v. General Motors Corp.,* 323 U.S. 373, 382 (1945) (recognizing that government must pay just compensation for whatever interest is taken when government "chops [the property] into bits… [taking] what it wants, however few or minute, and leav[ing] [the owner] holding the remainder…")

Importantly, an encumbrance restricting prospective uses must be distinguished from a mere regulatory restriction for at least three reasons. First, a zoning ordinance restricts only current uses, and may be lifted at any point in the future, should the political winds change. Luke A. Wake & Jarod Bona, *Legislative Exactions After Koontz v. St. Johns River Management District*, 27.4 Geo. Int'l Envtl. L. Rev. (forthcoming fall 2015) (manuscript at 42-45).[7] By contrast, once a restriction is recorded, an encumbrance limits the rights inuring to the title of the property in perpetuity, or for whatever term of years is specified.[8] Relatedly, in the absence of regulatory restrictions, the owner would have a common law right to engage in any reasonable use of his land. But, with a recorded encumbrance in place the owner is without right to use the property as he

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[7] *Available* online at at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564205 (last visited 10/12/15).

[8] *Cf. Brandt Revocable Trust v. United States*, 134 S.Ct. 1257, 1266 (2014) (looking to common law principles to determine whether a taking has occurred).

might like; regardless of what the law otherwise allows, an encumbrance imposes independent limitations as a matter of property or contract law. *See* Troy A. Rule, *Airspace and the Takings Clause*, 90 Wash. U. L. Rev. 421, 472 (2012).

By that same token, the public acquires no affirmative right in the subject property under an ordinary zoning regime, whereas the public assumes an interest in the subject property when an encumbrance is recorded limiting its prospective uses. Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land §1:1 (2011) ("An easement is commonly defined as a nonpossesory interest in land of another."); Restatement (First) of Property: Easement §450 (2011); Black's Law Dictionary, 509 (6th Ed. 1990). Thus, even if all regulatory restrictions should be lifted, the public authority would retain the right to enjoin specified uses pursuant to the terms of a recorded encumbrance. Roger Colinvaux, *The Conservation Easement tax Expenditure: In Search of Conservation Value*, 37 Colum. J. Envtl. L. 1, 55 (2012) (the right to enforce an easement is a "property right"). Put simply, a condition requiring a landowner to record an encumbrance amounts to a demand to dedicate an interest in the subject property to a public authority—not a mere regulatory restriction. Such a compelled transfer of property rights is by definition a taking of private property.

ii. The Recording of Restrictions Necessarily Encumbers Private Property—Carving From the Fee Simple Estate

Here, the California Court held that the recording of restrictions prospectively prohibiting the resale of properties at full-market rate were necessary to prevent subsequent owners from gaining a windfall, after having purchased the property at below-market rates. *San Jose*, 61 Cal. 4th at 467. The opinion emphasizes that this merely puts subsequent owners "on notice" that they have acquired title to the property without any right resell at market-rate—because the City maintains a claim on any revenues generated with a later sale to the extent the property is resold above market-rate. *Id*. But the fact that a subsequent landowner must pay the City in order to lift its claim on the property should only reinforce the view that a recorded restriction affirmatively encumbers the subject property.[9] *See Koontz*, 133 S.Ct. at 2594 (holding that a landowner cannot be required to pay money as a condition of exercising property rights, unless the exaction bears a nexus and is roughly proportional to anticipated public impacts).

Such a regime presupposes that the City has asserted some claim of right to maintain the

[9] Also, as a practical matter, a recorded restriction clouds the title to the property in the same way as would a lien or any other encumbrance because it remains in place—without regard to whether the City should choose to change its zoning restrictions at some point in the indefinite future.

property as part of its stock of affordable housing units—which necessarily means the owner's common law right to decide upon the selling price of the property has either (a) been transferred to the public already, or has (b) been prospectively conditioned on the requirement to dedicate money to the public. Indeed, if the property was not encumbered by a negative easement limiting the common law right to sell at fair-market rates, there would be no basis for requiring a subsequent owner to pay the City to lift those restrictions. *Id.* To be sure, a regime requiring a fee simple absolute owner to pay a monetary exaction, as a condition of enjoying his or her property rights, must be reviewed under *Nollan* and *Dolan*. *Id.* Thus the City's requirement to record a restriction limiting the right of future owners necessarily encumbers the subject property, limiting those rights vested in the transferred title. To say, as the California Supreme Court did, that such a recording merely puts subsequent owners on notice of an existing regulatory restriction is to manipulate common law property rights out of existence. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (affirming that a state court may not "by *ipse dixit* … transform private property into public property"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (rejecting the notion that property rights are extinguished with transfer of title when the purchaser acquires with notice of existing regulatory restrictions).

II. THIS COURT SHOULD GRANT *CERTIORARI* IN ORDER TO RESOLVE A SYSTEMIC CONFLICT AMONG THE LOWER COURTS AS TO THE PROPER TEST FOR REVIEWING LEGISLATIVE EXACTIONS

A. The Decision Below Contributes to a Growing Body of Law that Contravenes this Court's Essential Guidance in *Lingle* and *Koontz*

Amicus is all the more concerned with the California Supreme Court's wholesale repudiation of *Nollan* and *Dolan* in cases where an exaction has been imposed by statute or ordinance. Notwithstanding the fact that *Nollan* applied the nexus test in review of a condition imposed pursuant to requirements of the California Coastal Act,[10] and that *Dolan* applied the rough proportionality test in review of a condition imposed pursuant a local zoning code[11]—California, and growing number of other jurisdictions, hold that legislatively imposed exactions are somehow excluded from *Nollan* and *Dolan* review. *San Jose*, 61 Cal. 4th at 461. That decision also seemingly contravenes *Koontz*, which applied *Nollan* and *Dolan* in review of a monetary exaction imposed pursuant to the requirements of a Florida statute intended to protect wetlands.[12]

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[10] *See Nollan*, 483 U.S. at 828-30.

[11] *See Dolan*, 512 U.S. at 377-78.

[12] *See Koontz*, 133 S.Ct. at 2592.

The lower courts remain irreconcilably conflicted because this Court has never directly addressed the question of whether legislatively imposed exactions should be reviewed under a different test than those imposed on an *ad hoc* basis by an administrative body.[13] But in explaining that *Nollan* and *Dolan* were unconstitutional conditions cases—and in elucidating the theoretical underpinnings of the unconstitutional conditions doctrine—the *Koontz* decision should have given reason for courts to reevaluate and back-away from the supposed legislative exactions exception. As Justice Alito explained, the unconstitutional conditions doctrine recognizes a constitutional injury in a government forced choice between (a) forgoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development—regardless of whether the condition is imposed as a term of an approved permit or as a pre-condition of permit approval. *Koontz*, 133 S.Ct. at 2595.

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[13] Compare *Waters Landing Ltd. P'ship v. Montgomery Cnty.*, 650 A.2d 712 (Md. 1994) (refusing to apply *Nollan* and *Dolan* to legislatively imposed exaction requirements); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997) (same); *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (same); *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (same); with *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004) (declining to distinguish between legislatively and administratively imposed exactions); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000) (same); *B.A.M. Dev. L.L.C. v. Salt Lake Cnty*, 196 P.3d 601, 604 (Utah 2008).

But if an unconstitutional violation occurs whenever government thrusts such a repugnant choice upon a landowner, then there can be no justification for treating legislatively imposed exactions any differently than those imposed on an *ad hoc* basis. *Id*. The injury is the same either way. To be sure, the Court has always applied the unconstitutional conditions doctrine just the same when reviewing conditions imposed by a statute. *See e.g.*, *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) (conditioning receipt of government funds on waiver of rights). Indeed, in the seminal unconstitutional conditions case, this Court struck down a California statute that that unconstitutionally conditioned the right of commercial carriers to operate on public highways. *Frost*, 271 U.S. at 594. ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

The conclusion that legislatively imposed exactions are subject to *Nollan* and *Dolan* review is only bolstered by this Court's decision in *Lingle*, which rejected the substantial advancement test—emphasizing that any proper takings test must look to the burden imposed on the landowner's property rights because the test must ultimately ask whether the restriction goes too far. 544 U.S. at 529. This necessarily requires rejection of any posited exception to the *Nollan* and *Dolan* tests that would turn on the identity of the public actor imposing the

exaction. *See Stop the Beach Renourishment*, 560 U.S. at 715 (emphasizing that the Takings Clause is unconcerned with, which "particular state *actor* is" burdening property rights) (emphasis in the original). There is simply no justification for denying takings liability when the exaction is imposed pursuant to the terms of an enacted statute if the landowner suffers an identical injury to the one thrust upon the landowners in *Nollan*, *Dolan* and *Koontz*.

B. This Issue is Ripe for Review in the Wake of this Court's Recent Decisions in *Koontz* and *Arkansas Game & Fish Commission*

i. A Legislative Exactions Exception Would Enable Systematic Extortion of Small Businesses and Landowners Seeking Permits or Access to Public Services

In *Dolan*, Justice Rehnquist noted a potentially relevant distinction between legislatively imposed exactions and those imposed as an "adjudicative decision" by a permitting authority. *Dolan*, 512 U.S. at 385. But, he offered no theoretical grounding for why courts might "view legislatively imposed exactions in a different light—beyond the vaguely articulated concern that the court must be careful not to upset the presumption of constitutionality that generally applies when a zoning restriction is challenged." *Legislatively Exactions After Koontz v. St. Johns River*

Management District, s*upra*, at 10. In any event, the posited exception for legislatively imposed exactions is doctrinally inconsistent with the rule that government may not condition a permit approval on an extortionate requirement to dedicate property without just compensation. To be sure, an exception for legislative exactions would swallow the rule because permitting authorities invariably impose conditions in order to enforce the requirements of enacted statutes or zoning codes.

Indeed, public authorities are without any power to restrict common law property rights in the absence of legislatively enacted land use restrictions. *See* Blackstone, 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P. 41. Thus the only potential distinction may be between cases where a statute or ordinance vests a permitting authority with a degree of discretion, and other cases where the enactment leaves the authority no choice but to impose the contested condition. Yet, *Koontz* makes clear that any potential distinction must find its roots in the unconstitutional conditions doctrine, which has never been concerned with the degree of discretion vested in officials charged with enforcing the law, but has instead applied equally in review of conditions imposed on an *ad hoc* basis or by the express terms of an enacted statute. *See* James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 437 (2009).

Moreover, Justice Alito's opinion in *Koontz* emphasized that this Court rejects any posited

exception to *Nollan* and *Dolan* that would enable government to systematically coerce landowners into surrendering constitutionally protected rights as a condition of obtaining a permit approval. *Koontz*, 133 S.Ct. at 2595. But that is precisely what a legislative exactions exception would allow. It would permit government to inflict the very same injuries suffered by the landowners in *Nollan*, *Dolan* and *Koontz* without incurring any takings liability. Indeed, a legislative exception would enable the public to systematically force targeted landowners into dedicating portions of their land, or monetary assets, for new roads, schools, parks, airports etc.

The prospect of acquiring property, without paying anything, is undoubtedly an attractive option for cash-strapped counties and cities—too tempting to resist. For example, lawmakers in Pasco County Florida have enacted an insidious law prohibiting the issuance of building permits for properties within the footprint of a planned highway, except on the condition that the landowner dedicate the land within that highway corridor. *See Hillcrest Prop., LLP v. Pasco Cnty.*, 939 F.Supp.2d 1240, 1242 (M.D. Fla. 2013) (chiding a County attorney for "proudly declar[ing], 'the [regime] … saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages."). So long as this Court remains silent on the issue of legislative exactions, lawmakers will continue to expand these pernicious regimes so as to force a handful of citizens "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

ii. This Court Eschews *Per Se* Defenses That Allow Government Actors to Immunize Themselves From Takings Liability

What is more, Justice Ginsberg's opinion in *Arkansas Game & Fish Commission* lends further support to the conclusion that our takings jurisprudence rejects any rule that would allow for systematic circumvention of *Nollan* and *Dolan*. She explained that this Court generally rejects *per se* takings defenses. *Arkansas Game & Fish Comm'n*, 133 S.Ct. 511, 518 (2012). This necessarily places the burden on government to offer a compelling doctrinal basis for a legislative exactions exception—but neither the California Supreme Court, nor any of her sister courts have been able to articulate a principled justification for a legislative exactions exception. The closest they have come to offering a rationale is in the assertion that legislative exactions are somehow different because they represent the culmination of the democratic process, which presumptively weighs competing public policy considerations, *San Remo Hotel L.P. v. City And Cnty. of San Francisco*, 27 Cal. 4th 643, 671 (2002); however, our takings jurisprudence has never suggested that government actions inflicting constitutional injuries are any less pernicious when carried out at the hands of the legislature. *Lingle*, 544 U.S. at *Id*. at 529 (explaining that the takings test considers the "the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how [the] regulatory burden is *distributed* among property owners."). Regardless of whether an enactment is

calculated to advance the interests of the general public, the Takings Clause prohibits enforcement of laws that so burden private property rights as to amount to a taking—except where just compensation is assured. *Mahon*, 260 U.S. at 415.

The only other apparent justification is that the wheels of government will somehow grind to a halt if communities are prohibited from imposing legislative exactions. *C.f.* John D. Echeverria, *Koontz*: *The Very Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1, 3 (2014) (arguing that stringent application of *Nollan* and *Dolan* may result in "negative practical effects on local governments"). But Justice Ginsberg's opinion in *Arkansas Game & Fish* likewise repudiates arguments of this nature. *Arkansas Game & Fish Comm'n*, 133 S.Ct. at 521 (noting that "[t]he sky did not fall after *Causby,* and today's modest decision augurs no deluge of takings liability."); *Koontz*, 133 S.Ct. at 2600 (dismissing the dissents concerns as "exaggerate[d]"). For one, constitutional doctrine should not be shaped by the question of what is expedient for government because such an approach undermines the fundamental premise of our legal system that the Constitution imposes objective limitations on what government may do to its citizens.[14] Moreover, it's hard to take seriously the argument that the sky will fall with enforcement of *Nollan* and *Dolan* because the nexus and rough proportionality tests merely require that the government must be able to

[14] *Cf. Brandt Revocable Trust v. United States*, 134 S. Ct. at 1269 (rejecting expedient concerns that application of the Takings Clause would cost taxpayers hundreds of millions of dollars).

demonstrate that a condition imposed on a permit is logically related to mitigating anticipated public impacts. *Koontz*, 133 S.Ct. at 2595 (emphasizing that *Nollan* and *Dolan* allow for "responsible land-use policy[,]" enabling authorities to impose conditions requiring landowners to "internalize [] negative externalities[,]" while prohibiting government from using the permitting regime a tool for extortion).

CONCLUSION

For the foregoing reasons the petition for *certiorari* should be granted.

Respectfully submitted,

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