No. 15-330

In The
Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASS'N,

Petitioner,

v.

CITY OF SAN JOSE, *et al*.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether legislatively imposed building permit conditions are subject to heightened scrutiny and are invalid under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF has members who reside, own property, and work in all 50 states.

Since its creation in 1977, MSLF and its attorneys have defended individual liberties and have been active in litigation opposing governmental

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this brief was received by counsel of record for all parties at least ten days prior to the filing of this brief and all parties have consented to this filing. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

actions that result in takings of private property. *See*, *e.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (represented Plaintiff); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (Plaintiff); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae).

Moreover, MSLF has a tangible interest in this case because the right to own and use real property is central to many MSLF members' ability to earn a livelihood. The California Supreme Court's decision is a serious departure from settled Takings Clause jurisprudence. Accordingly, MSLF respectfully submits this amicus curiae brief in support of the Petitioner.

STATEMENT OF THE CASE

I. THE CITY OF SAN JOSE'S INCLUSIONARY HOUSING ORDINANCE.

In January 2010, Respondent City of San Jose ("San Jose") adopted a 57-page inclusionary housing ordinance ("IHO"). The IHO conditions development projects of 20 or more residential units upon the sale of 15% of the units ("inclusionary units") at a price affordable to those earning an extremely low to moderate income. *See* San Jose Municipal Code § 5.08.400 ("Code"). The inclusionary units are

subject to long-term encumbrances to ensure that the units are not immediately resold at market value. *Id.* § 5.08.600(A). The encumbrances remain in effect for not less than 45 years for for-sale units and 55 years for rental units. *Id.* § 5.08.600(B); *see* Cal. Health and Safety Code § 33413(c)(1),(2).

Alternatively, the IHO provides that property owners can: (1) build affordable housing units off-site, equal to 20% of the number of market rate units in the development, Code § 5.08.500(B); (2) pay an in-lieu fee of over $100,000 per affordable housing unit, *id.* § 5.08.520; (3) dedicate land suitable for the construction of affordable units, *id.* § 5.08.530; or (4) acquire and rehabilitate existing affordable units, *id.* § 5.08.550. The IHO contains additional incentives to encourage developers to subsidize 15% of the units in the original development, including density bonus credits, a reduction in the number of parking spaces otherwise required for new developments, a reduction in the minimum setback requirements, and financial subsidies and assistance from San Jose in the sale of the affordable units. *Id.* § 5.08.450.

II. PROCEDURAL HISTORY.

Shortly after San Jose enacted the IHO, Petitioner, California Building Industry Association ("CBIA"), challenged the IHO as violating the unconstitutional conditions doctrine as defined by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374

(1994). The trial court invalidated the IHO and enjoined San Jose from enforcing it unless and until it "provides a legally sufficient evidentiary showing to demonstrate justification and reasonable relationships between such IHO exactions and impacts caused by new development." Petitioner's Appendix ("Pet. App.") at C-11. San Jose appealed. The California Court of Appeals reversed, holding that it was CBIA's burden to prove that the IHO was invalid, not San Jose's burden to prove it had authority to promulgate the IHO. *Id*. at B-23–B-24. The Court of Appeals reached its conclusion by relying on state law instead of considering relevant federal law.

CBIA petitioned the California Supreme Court for review. The court was asked to decide, *inter alia*, the extent to which the decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), governs judicial review of the IHO's burdens on property rights. The California Supreme Court wrongly relied on state court cases and the dissent in *Koontz*, holding that the IHO's conditions did not constitute an exaction and thus the IHO does not "bring into play the unconstitutional conditions doctrine under the Takings Clause of the federal or state Constitution." Pet. App. at A-6. The court held that the conditions imposed by the IHO serve the "constitutionally legitimate purposes" of increasing affordable housing and of distributing affordable housing throughout San Jose as part of mixed-income developments. *Id.* at A-6–A-7. The California Supreme Court further held that the unconstitutional

conditions doctrine, as defined in *Nollan* and *Dolan*, does not apply to legislatively imposed conditions. *Id.* at A-34. Given the errors in the California Supreme Court's decision, CBIA has petitioned this Court for review. Because the California Supreme Court's decision writes the protections found in the Takings Clause out of the Constitution, this Court should grant the Petition.

SUMMARY OF THE ARGUMENT

Property rights are fundamental to a free society and thus must be afforded the utmost protection. The Constitution protects property rights by forbidding the government from taking private property without paying just compensation. U.S. Const. amend. V. Yet, the California Supreme Court ignored the guarantees found in the Takings Clause in declining to apply the unconstitutional conditions doctrine to the IHO. Pet. App. at A-6. The court also wrongly held that the IHO's arduous conditions do not constitute an exaction. *Id.* Finally, the court erred in holding that the legislatively imposed exactions are exempt from heightened review under the unconstitutional conditions doctrine. *Id.* at A-34.

First, because it is the purpose of the judiciary to see that the government does not run afoul of the Constitution, this Court should grant the Petition and correct the California Supreme Court's errors. Moreover, it is the purpose of the judiciary to protect

private property from government overreach. The California Supreme Court failed to fulfill this duty by holding that the IHO does not place unconstitutional conditions on private property in San Jose. Therefore, this Court should grant the Petition to correct this error.

Second, the Constitution affords broad protection for property rights, including the rights to freely use and dispose of private property. However, the IHO tramples these rights by placing onerous restrictions on a property owner's ability to use and dispose of private property. Again, the California Supreme Court failed to properly protect private property rights from government intrusion by upholding the IHO, which warrants review by this Court.

Third, this Court has correctly recognized that property owners are "especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take." *Koontz*, 133 S. Ct. at 2594. Therefore, the unconstitutional conditions doctrine exists to protect property owners from being forced to relinquish certain property rights as a condition to being able to exercise other property rights. However, the unconstitutional conditions doctrine cannot protect property owners where, as here, a court simply refuses to apply it. Therefore, this Court should grant the Petition to ensure that the IHO and other similar ordinances are subject to heightened scrutiny.

Fourth, despite well-established unconstitutional conditions jurisprudence, the California Supreme Court rejected the doctrine and refused to apply it to a legislatively mandated exaction. Just as the Takings Clause is "concerned simply with the act, and not with the governmental actor," *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 713-14 (2010), so too is the unconstitutional conditions doctrine concerned simply with the exaction and not with whether the exaction is legislatively mandated or a result of an administrative adjudication. Unfortunately, the California Supreme Court is hardly alone in grappling with this question. Because lower courts are divided on whether the unconstitutional conditions doctrine applies to legislatively mandated exactions, this Court should grant the Petition and settle this important question of federal constitutional law.

REASONS FOR GRANTING THE PETITION

I. THE PURPOSE OF THE JUDICIARY IS TO PROTECT PRIVATE PROPERTY RIGHTS.

The sanctity of property in America can be traced to the Magna Carta. Bernard H. Siegan, *Economic Liberties and the Constitution* 1-57 (2d ed. 2006). Chapter 39 of the Magna Carta (1215) provides: "[n]o freeman shall be taken or imprisoned, or disseised . . . unless by the lawful judgment of his peers, or by the law of the land." Chapter 29 of the 1225 charter

"broadened and replaced" chapter 39 of the original charter, providing "'[n]o freeman shall be taken or imprisoned, or disseised of his freehold, or liberties . . . but by lawful judgment of his peers, or by the law of the land. . . .'" Siegan, *Economic Liberties*, *supra*, at 7 (quoting Magna Carta (1225)). Thus, the Magna Carta secured private property against arbitrary deprivations by the government.[2] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed. 1998).

Importantly, early American colonists believed the right to property, guaranteed in the Magna Carta, to be part of their birthright as English subjects. *Id.*; Siegan, *Economic Liberties*, *supra*, at 7. For example, in 1687, William Penn proclaimed:

> It may reasonably be supposed that we shall find in this part of the world, many men, both old and young, that are strangers, in a great measure, to the true understanding of that inestimable inheritance that every Free-born Subject of England is heir unto by Birth-right, I mean that unparalleled privilege of *Liberty and Property* . . . in pursuance of which I do here present thee with that

[2] The phrase "by the law of the land," used in the Magna Carta, is now known as "due process of law." *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (The words "by the law of the land" are "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.").

> ancient garland, the fundamental laws of England, bedecked with many precious privileges of *Liberty and Property* by which every man that is a Subject to the Crown of England, may understand what is his right, and how to preserve it from unjust and unreasonable men. . . .

William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (1687) (emphasis in original), *reprinted in*, 1 *The Founders' Constitution* 431-32 (P. Kurland and R. Lerner eds., 1987). Around this time, John Locke published his famous *Second Treatise of Government*, in which he explained that private property existed under natural law before the creation of governments. John Locke, *Second Treatise of Government*, §§ 25-51 (1690) (C. B. Macpherson ed., 1980); *see also* Sir William Blackstone, *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England* 9 (ABA ed., 2009) (identifying the "absolute rights" of the individual as "the right of personal security, the right of personal liberty, and the right of private property").

Because private property existed before government, any legitimate government is based on a compact whereby people gave their allegiance to the government in exchange for the protection of their property. Locke, *Second Treatise*, *supra*, §§ 123-131; *id.* § 124 ("The great and *chief end* therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*."

(emphasis in original)); *id*. § 123 (Men are "willing to join in society with others, who are already united, or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*." (emphasis in original)).

The influence of Locke on the Framers of the Constitution cannot be understated. *See* Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002) (The Framers recognized that "principles of good government started with the protection of private property. . . ."). For example, Thomas Jefferson incorporated Locke's principles into the *Declaration of Independence*:

> WE hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.

1 Stat. 1 (July 4, 1776).[3] Also taking a page from Locke, John Rutledge of South Carolina told the

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[3] Although Jefferson substituted "Pursuit of Happiness" for "estates," this change should not be interpreted as lessening the importance of property rights. In fact, " 'the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.' " Ely, *The Guardian*, at 29 (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (University of North Carolina Press 1980)).

delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." Ely, *The Guardian*, at 43 (quoting 1 *The Records of the Federal Convention of 1787*, 534 (Max Farrand ed., 1937)). Alexander Hamilton also believed that "[o]ne great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention*, *supra*, at 302); *see also The Federalist Papers*, The Federalist No. 85, 520 (Hamilton) (Clinton Rossiter ed., 1961) (expounding that the adoption of the Constitution would provide "additional securit[y] . . . to liberty, and to property"). Thus, the principal function of government is to ensure the sanctity of private property. *See Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.").

Likewise, protection of private property is essential to liberty and a free society. For example, in 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty" . . . "is that of enjoying

> private property without undue interference or molestation." . . . The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. *Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen*."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations omitted) (emphasis added).

To guarantee the protection of private property, the Framers separated the government's powers into three co-equal branches, and intended for the judiciary to be the ultimate protector of property and liberty. *United States v. Lee*, 106 U.S. 196, 218-20 (1882) (acknowledging judiciary must enforce the guarantees of the Fifth Amendment); Clint Bolick, *David's Hammer: The Case for an Activist Judiciary* 35-47 (2007). For example, Alexander Hamilton explained that it is the duty of the judiciary "to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 85, at 466 (Hamilton); *accord Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is" and to

declare that a law "repugnant to the [C]onstitution, is void.").

The foregoing demonstrates that the government may not ignore its duty to protect, rather than exploit, private property rights. Specifically, it is the role of the judiciary to ensure that government does not run afoul of the Constitution. In spite of its duty to protect private property rights, the California Supreme Court wrongly held that the conditions in the IHO do not constitute an exaction. Pet. App. at A-35–A-36. Because the California Supreme Court ignored its duty to uphold the guarantees of the Constitution, this Court should grant the Petition.

II. THE CALIFORNIA SUPREME COURT'S DECISION DESTROYS PRIVATE PROPERTY RIGHTS.

Given the obvious import of protecting private property rights, the Takings Clause in the Fifth Amendment expressly protects private property owners from the taking of private property by the government without just compensation. U.S. Const. amend V. Indeed, the Fifth Amendment protects all of the interests within a property owner's bundle of sticks, including rights to possess, use, and dispose of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (citation omitted). A property owner also has a protected right to exclude others from his property. *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). Although

property is protected by the Constitution, "[g]enerally speaking, state law defines property interests. . . ." *Stop the Beach Renourishment*, 560 U.S. at 707 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)). California specifically recognizes a property owner's right to sell and transfer property. *See Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983). This right extends so far as to protect the owner's ability to "sell [his property] to whom he pleases and at such price as he can obtain." *Ex parte Quarg*, 84 P. 766, 767 (Cal. 1906).

Despite the IHO's severe conditions, the California Supreme Court found that application of the IHO would not result in an exaction because the IHO "does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside the permit process." Pet. App. at A-35–A-36. This is wholly incorrect. In fact, each of the conditions imposed by the IHO require property owners to convey identifiable protected property interests, for which San Jose would be required to pay just compensation outside of the IHO's permitting process.

The IHO requires property owners seeking to build 20 or more dwelling units to sell 15% of those units at an "affordable housing cost" as further defined within the IHO. Pet. App. at A-16. This requirement destroys a property owners' protected right to sell private property "to whom he pleases and at such price as he can obtain." *Ex parte Quarg*, 84 P. at

767; *see* § 5.08.250(A)(a). Only *after* a property owner agrees to surrender his property interests, will San Jose allow the property owner to develop his private property. *Id*. §§ 5.08.250; 5.08.400. Thus, to comply with the IHO, a property owner in San Jose must give up a property right to which San Jose or the general public is not otherwise entitled.

The alternative measures found in the IHO are equally demanding and each require property owners to convey identifiable protected property interests. First, instead of selling 15% of their units at an affordable housing cost, property owners can build new off-site inclusionary units equal to 20% of the number of market rates units in the development. Code § 5.08.500(B). This alternative forces property owners to convey property directly to San Jose or otherwise surrender their protected right to sell to whom they please at the price they can obtain. *See Ex parte Quarg*, 84 P. at 767. Clearly, this alternative also forces a property owner to give up a property interest, for which San Jose otherwise would have been required to pay just compensation under the Takings Clause and outside the permitting process.

Second, property owners can pay San Jose an in-lieu fee calculated as the difference between the median sales price of an attached market rate unit in the prior 36 months and the affordable housing cost for a household of 2.5 persons earning no more than 110% of the area's median income. *Id.* § 5.08.520(B)(1). Yet the Fifth Amendment is unconcerned with the means by which a taking occurs and

monetary exactions run afoul of the Takings Clause just the same as other land use exactions. *See Koontz*, 133 S. Ct. at 2599 (Monetary exactions "are functionally equivalent to other types of land use exactions."). Therefore, this alternative also forces property owners to give up property interests, to which San Jose has no entitlement outside of the permitting process.

Third, property owners can dedicate land for the development of inclusionary units. Code § 5.08.530. Such a dedication must have a value equal or greater than the applicable in-lieu fee. *Id.* To accomplish this, a property owner must transfer marketable title to his or her property to San Jose or to an "affordable housing Developer approved by" San Jose. *Id.* § 5.08.530(A)(1). However, San Jose is "not [] required to construct restricted income units on the site . . . , but may sell, transfer, lease, or otherwise dispose of the dedicated site, so long as any funds collected are deposited into the San Jose Affordable Housing Fee Fund." *Id.* § 5.08.530(B). Again, this alternative demands a conveyance of an identifiable protected property interest, for which San Jose would be required to pay just compensation outside of the permitting process.

Fourth, property owners can acquire and convert existing off-site units to inclusionary units. Code § 5.08.550. The IHO requires a property owner to rehabilitate two units in lieu of each single inclusionary unit required by § 5.08.500(A). If a property owner chooses this option, the property that is rehabilitated will also have inclusionary housing restrictions

recorded against it. *Id.* §§ 5.08.550(N); 5.08.600(B). Therefore, this alternative also requires a property owner to give up a property interest for which San Jose would have been otherwise required to pay just compensation to acquire.

Plainly, each of the IHO's options injure private property owners by requiring them to give up property interests for which the government would have been required to pay just compensation outside of the permitting process. Thus, the terms of the IHO clearly constitute unlawful exactions. This type of government regulation is prohibited by the Takings Clause. Moreover, mere "public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Therefore, the California Supreme Court erred in holding that "[r]ather than being an exaction, the [IHO] falls within . . . municipalities' general broad discretion to regulate the use of real property. . . ." Pet. App. at A-36. Because the court erred in holding that the conditions in the IHO do not effect exactions, this Court should grant the Petition.

III. THE DECISION BELOW RENDERS THE UNCONSTITUTIONAL CONDITIONS DOCTRINE MEANINGLESS.

In relation to the Fifth Amendment, the unconstitutional conditions doctrine was developed to "provide important protection against the misuse of

the power of land-use regulation." *Koontz*, 133 S. Ct. at 2591. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 837 ("The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.").

In *Nollan*, the California Coastal Commission attempted to exact an easement from property owners seeking a building permit. 483 U.S. at 827-28. This Court determined that the agency needed to demonstrate an "essential nexus" between the alleged public impacts from a development and the easement, *id*. at 837, otherwise the easement was "not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id*. (internal citations omitted). Later, in *Dolan*, this Court refined the unconstitutional conditions doctrine, requiring a city to demonstrate an essential nexus *and* rough proportionality between the conditions imposed and the impact of a property owner's proposed action. 512 U.S. at 391.

Most recently, this Court extended the protections of the unconstitutional conditions doctrine to monetary demands. *See Koontz*, 133 S. Ct. at 2595 ("Extortionate [monetary] demands . . . frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits

them."). "Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* Therefore, when a regulation implicates the exercise of constitutionally guaranteed property rights, courts must determine: (1) whether an essential nexus exists between the condition and the rights being exercised; and (2) whether the condition is roughly proportionate to the purported impact of the exercise of the constitutional right. *Id.*

Instead of applying the unconstitutional conditions doctrine as defined by this Court, the California Supreme Court sanctioned state destruction of private property rights by holding that the unconstitutional conditions doctrine was inapplicable because the IHO "restricts the use of property without demanding the conveyance of some identifiable protected property interest . . . as a condition of [permit] approval." Pet. App. at A-35. The court reached this conclusion by asserting that the IHO "simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale." *Id.* at A-36 (internal citation omitted). The court considered only the IHO's preferred alternative, *i.e.*, the requirement that property owners set aside 15% of their units as inclusionary housing. *See* Code § 5.08.400. However, the court's analysis was erroneous given the fact

that the IHO encumbers inclusionary units. *Id.* § 5.08.600(A), (B). For instance, if a property owner sells an inclusionary unit and the purchaser later decides to resell it, San Jose may be allowed "to capture at resale the difference between the market rate value of the Inclusionary Unit and the Affordable Housing Cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary by [San Jose] to replace the Inclusionary Unit." *Id.* § 5.08.600(A). Moreover, inclusionary rental units remain encumbered by the IHO for at least 55 years and inclusionary for-sale units remain encumbered by the IHO's terms for at least 45 years. *Id.* How the California Supreme Court could find that the IHO does not demand conveyance of a property interest is bewildering.

Outside of the IHO, and without paying just compensation, San Jose would have no right to demand that property owners encumber their private property for the sake of increasing inclusionary housing. *See*, *e.g.*, *Dolan*, 512 U.S. at 384 ("Without question had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than condition their permit to rebuild their house on their

agreeing to do so, we have no doubt there would have been a taking."). Although the court did not consider the alternative measures in the IHO, each of those also constitutes an exaction. *See* § II, *supra* (discussing each of the IHO's alternative measures). Given the foregoing, the IHO plainly implicates the unconstitutional conditions doctrine.

Instead of analyzing the IHO under heightened scrutiny as defined in *Nollan* and *Dolan*, the California Supreme Court applied relaxed scrutiny, finding that ordinances such as the IHO are constitutionally permissible "so long as [they] bear[ ] a reasonable relationship to the public welfare." Pet. App. at A-26. This relaxed "reasonable relationship" test is not what the Constitution requires. In upholding the IHO, the California Supreme Court egregiously forces "some people alone 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). Given the foregoing, this Court should grant the Petition and settle this important question of constitutional law.

IV. LOWER COURTS APPLY THE UNCONSTITUTIONAL CONDITIONS DOCTRINE INCONSISTENTLY.

The California Supreme Court wrongly held that the unconstitutional conditions doctrine does not apply to legislatively mandated exactions. Pet. App. at A-33–A-34, n.11 ("The Koontz decision does not

purport to decide whether the *Nollan*/*Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments." (citing dissenting opinion in *Koontz*, 133 S. Ct. at 2604-12)). The history of the unconstitutional conditions doctrine dispels the court's holding. In fact, *Nollan*, *Dolan*, and *Koontz* all involved legislatively mandated exactions. *Nollan*, 483 U.S. at 828-30 (unconstitutional conditions legislatively imposed by the California Coastal Act and California Public Residential Code); *Dolan*, 512 U.S. at 377-78 (unconstitutional conditions legislatively imposed by city's development code); *Koontz*, 133 S. Ct. at 2592 (unconstitutional conditions imposed by the defendant municipality as a result of Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984). However, whether a taking occurs legislatively or as a result of an administrative decision, courts are no less responsible for protecting private property rights from government overreach. *See*, *e.g.*, *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari) ("It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."). Indeed, the means through which the state effectuates a taking has no bearing on whether one has occurred.

The inconsistent application of the unconstitutional conditions doctrine leaves property owners vulnerable. *See*, *e.g.*, David L. Callies, Koontz *Redux: Where We Are And What's Left*, 65 Planning & Envtl. L. No. 10, 7 (2013) ("[T]he U.S. Supreme Court has yet to decide whether legislative exactions should be analyzed under *Nollan* and *Dolan*, and lower courts remain in disagreement over the issue."). A circuit split exists between the First Circuit Court of Appeals, which applies the unconstitutional conditions doctrine to legislatively mandated exactions, *see City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995), and the Tenth Circuit Court of Appeals which applies the unconstitutional conditions doctrine only to administratively imposed conditions, *see Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011).

In *City of Portsmouth*, the First Circuit properly invalidated the city council's attempt to exact payments to a fund for low income housing from property owners seeking zoning permits. 57 F.3d at 16. Oppositely, in *Alto Eldorado*, the Tenth Circuit upheld the City and County of Santa Fe's affordable housing ordinance. 634 F.3d at 1172. The Tenth Circuit declined to apply the unconstitutional conditions doctrine, holding instead that the challenged affordable housing ordinance did not effectuate a "permanent physical invasion" of plaintiff's property. *Id.* at 1178. The court further held that restrictions on land use or the imposition of fees were patently different than physical takings. *Id*. However, after *Alto Eldorado*

was decided, this Court clarified in *Koontz* that the unconstitutional conditions doctrine applies even where the exercise of a constitutional right is conditioned upon the payment of a fee. *Koontz*, 133 S. Ct. at 2599. This Court's decision in *Koontz* severely undercuts the Tenth Circuit's analysis, but because *Alto Eldorado* has not been expressly overruled, it remains controlling precedent within the Tenth Circuit. *See*, *e.g.*, *Powell v. Cnty. of Humboldt*, 166 Cal. Rptr. 3d 747, 756 (Cal. App. 2014) (relying on *Alto Eldorado* for proposition that land use exactions must be the equivalent of a per se physical taking).

The federal courts in California are also confused. The Ninth Circuit previously held that the unconstitutional conditions doctrine does not apply to legislatively mandated exactions. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (unpublished). Yet, more recently, the United States District Court for the Northern District of California properly applied the unconstitutional conditions doctrine to a legislatively mandated exaction, finding San Francisco had "crossed the constitutional line between permissible governmental regulation of land and an impermissible monetary exaction that lacks an essential nexus and rough proportionality to the impact of the [challenged ordinance]." *Levin v. City and Cnty. of San Francisco*, 71 F.Supp.3d 1072, 1089 (N.D. Cal. 2014).

In *Levin*, developers challenged a city ordinance that restricted property owners' abilities to withdraw privately owned rental properties from the rental

market. 71 F.Supp.3d at 1075-79. For example, even if a property owner survived the permitting process and received permission from San Francisco to withdraw a rental unit from the rental market, the owner's property would remain encumbered for the next decade. *Id.* at 1076. If a withdrawn rental unit was put back on the rental market within ten years of its withdrawal, San Francisco's ordinance required the property owner to offer the rental unit to the last tenant. *Id.* Clearly, San Francisco's ordinance stripped property owners of their rights to use and dispose of their property as they choose. *See Gregory*, 191 Cal. Rptr. at 58; *Ex parte Quarg*, 84 P. at 767. So too does the IHO force property owners to waive certain property interests to be allowed to exercise other protected rights.

State supreme courts are also divided on the question of whether the unconstitutional conditions doctrine applies to legislatively mandated land use conditions. *Compare Home Builders Ass'n of Dayton and Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000) (applying unconstitutional conditions doctrine to legislatively mandated exactions); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (same); *with St. Clair Cnty. Homebuilders Ass'n v. City of Pell City*, 61 So.3d 992, 1007 (Ala. 2010) (failing to apply unconstitutional conditions doctrine to legislatively mandated exactions); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003) (same). These cases demonstrate that many courts have failed to

properly apply the unconstitutional conditions doctrine. At a minimum, this Court cannot ignore the inconsistent application of the unconstitutional conditions doctrine. Given the split between federal Courts of Appeals, and the confusion among state courts, this Court should grant the Petition and settle this important issue of federal constitutional law.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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