No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A San Jose, California, ordinance conditions housing development permits upon a requirement that developers sell 15% of their newly-built homes for less than market value to city-designated buyers. Alternatively, developers may pay the city a fee in lieu. The California Supreme Court held that, even where such legislatively-mandated conditions are unrelated to the developments on which they are imposed, they are subject only to rational basis review.

This raises an issue on which the state courts of last resort and federal circuit courts of appeal are split nationwide. The question presented is:

Whether such a permit condition, imposed legislatively, is subject to scrutiny and is 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).

LIST OF ALL PARTIES

California Building Industry Association was the appellee in the California state appellate and supreme court proceedings below and is the petitioner herein.

City of San Jose, California, is the municipal respondent.

Affordable Housing Network of Santa Clara County, Housing California, California Coalition of Rural Housing, Law Foundation of Silicon Valley, Non-Profit Housing Association of Northern California, The Public Interest Law Project, Southern California Association of Non-Profit Housing, San Diego Housing Federation, and Janel Martinez were intervenor-defendants siding with the City of San Jose in the California appellate and supreme court proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent companies, subsidiaries, or affiliates that are publicly owned corporations, and there is no publicly held corporation that owns 10% of its stock.

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PETITION FOR WRIT OF CERTIORARI

California Building Industry Association respectfully requests that this Court issue a writ of certiorari to review the judgment of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435, 351 P.3d 974 (2015), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The opinion of the California Court of Appeal, 157 Cal. Rptr. 3d 813 (2013), is reproduced in Pet. App. at B. The opinion of the California Superior Court for the County of Santa Clara is not published but is reproduced in Pet. App. at C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). California Building Industry Association filed a lawsuit challenging the enactment of a City of San Jose, California, ordinance as violating the unconstitutional conditions doctrine under the Fifth Amendment of the United States Constitution. The association prevailed at trial court, but the decision was reversed by the California Supreme Court in an opinion dated June 15, 2015. The decision became final on July 15, 2015, thirty days following the issuance of the decision by the California Supreme Court. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The City of San Jose Adopted an Ordinance Requiring Developers To Dedicate a Significant Portion of Residential Housing Projects to the City's Stock of Affordable Housing Units

For the past half-century, California cities and counties have struggled with the pressures caused by high housing demand. One of the problems associated with a hot market is a low number of houses available to people with low incomes. Over the years, cities and counties have experimented with a variety of approaches to increase the inventory of low-income housing. San Jose's "Inclusionary Housing Ordinance" is one of the latest experiments.

Prior to adopting the ordinance, the City of San Jose determined that the City needed an additional 19,300 units of low income housing in order to meet the needs of the community. A study determined that the city's existing low-income housing inventory would not meet that demand, so the city enacted a law that uses the permit process to require developers to create new low-income housing when they build new residential housing developments of more than 20 units. Pet. App. D–4-5 (San Jose Municipal Code (SJMC) § 5.08.400).

The ordinance requires these developers to set aside 15% of their units for sale at an "affordable housing cost" and to sell those units only to people earning from extremely low up to moderate incomes. Pet. App. D–5 (SJMC § 5.08.400(A)(a)). The set-aside units are subject to long-term recorded encumbrances that ensure that the homes themselves remain part of

the City's stock of affordable housing. Pet. App. D–22 (SJMC § 5.08.600(A)). The long-term affordability restrictions remain in effect for 45 years for for-sale homes and 55 years for rental homes. Pet. App. D–22 (SJMC § 5.08.600(B)).

In the alternative to setting aside homes in the permitted development, builders may substitute one or more of the following exactions in combination:

> (1) Build affordable housing units offsite equal to 20% of the number of market rate units in the development. Pet. App. D–12 (SJMC § 5.08.500(B))
>
> (2) Pay an in-lieu fee of approximately $122,000 per affordable housing unit.[1] Pet. App. D–14 (SJMC § 5.08.520); Pet. App. C–3.
>
> (3) Dedicate land suitable for construction of inclusionary units value at least equal to the applicable in-lieu fee. Pet. App. D–17-18 (SJMC § 5.08.530).
>
> (4) Acquire and/or rehabilitate existing units for use as inclusionary units. Pet. App. D–19-21 (SJMC § 5.08.550).

[1] The amount of the in-lieu fee is 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 2½ persons earning no more than 110% of the area median income. Pet. App. D–14 (SJMC § 5.08.520(B)(1)).

B. The Trial Court Invalidates the Ordinance Because the Affordable Housing Dedication Is Unrelated to Any Impacts Caused by New Residential Development

Petitioner California Building Industry Association (CBIA) filed a lawsuit, seeking to invalidate the ordinance provisions as unconstitutional conditions as that doctrine is set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[2] Pet. App. A–4, 28; Pet. App. C–2.

In *Nollan*, a land-use agency—the California Coastal Commission—acting pursuant to the requirements of a state law required the Nollans, owners of beachfront property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827-28. The condition was specifically justified on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court, arguing that the condition constituted a taking because it bore no connection to the impact of their proposed remodel.

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[2] The complaint raised other claims that are not presented in this Petition.

This Court agreed, holding that the easement condition was invalid because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused. *Id.* at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id*. at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id*. at 837 (citations omitted).

In *Dolan*, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use. There, the city's development code imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control improvements and a bicycle path. 512 U.S. at 377. Dolan refused to comply with the conditions and sued the city in state court, alleging that the development conditions effected an unlawful taking and should be enjoined. This Court held that the City established a nexus between both conditions and Dolan's proposed expansion, but nevertheless held that the conditions were unconstitutional. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The *Dolan* Court held that the city had not demonstrated

that the conditions were roughly proportional to the impact of Dolan's expansion and invalidated the permit conditions. *Id.*

Applying the *Nollan* and *Dolan* tests, the trial court found that (1) the affordable housing condition required developers to convey or dedicate a property interest to the public and (2) the City had not identified any evidence that the affordable housing condition was related to any impact caused by the construction of new housing. Pet. App. C–9.

> [Under the Ordinance], a developer is required to sell 15% of its homes in affected developments, and which are substantially similar to the rest of the homes in the development, at below market rates. This Court believes that it is incumbent for the city to demonstrate its legal ability to require that a developer sell a home at a level which may be potentially lower than its costs in building that home.
>
> . . .
>
> Without this essential nexus, between the permit condition and the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.
>
> This Court had previously asked the City of San Jose to demonstrate where in the record there was evidence demonstrating the constitutionally required reasonable relationships between deleterious public impacts of new residential development and the new requirements to build and to

> dedicate the affordable housing or pay the fees in lieu of such property conveyances. The City of San Jose has appeared to be unable to do so.

Pet. App. C–9-10 (citation and quotation marks omitted). Accordingly, the court invalidated the ordinance as unconstitutional and permanently enjoined San Jose from imposing the condition absent a showing of nexus and proportionality. Pet. App. C–10-11.

The California Court of Appeal reversed on state law grounds, declining to address *Nollan* and *Dolan* under the belief that those cases were limited to dedications of real property, not monetary exactions. Pet. App B-19, n.8. That belief was repudiated three weeks later when this Court decided *Koontz*, holding that the *Nollan* and *Dolan* tests also limit the municipal practice of exacting money (e.g., "impact fees" or "fees in lieu") from developers. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2600 (2013).

C. The California Supreme Court Holds That *Nollan*, *Dolan*, and *Koontz* Do Not Apply to Legislatively-Mandated Exactions

The California Supreme Court granted review to address CBIA's claim that, as a matter of federal constitutional law, the Ordinance is subject to the unconstitutional conditions doctrine under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution. Pet. App. A–4-5, 28-35. The court analyzed this Court's decisions in *Koontz*, *Dolan*, and *Nollan*, and held that the ordinance is not subject to

scrutiny under these precedents, Pet. App. A–28-35. The court offered two reasons.

First, relying on state case law interpreting *Nollan* and *Dolan* and the dissenting opinion in *Koontz*, the California court concluded that the affordable housing condition did not constitute an "exaction." Pet. App. A–35-36. In reaching that conclusion, the court acknowledged that the ordinance demanded that developers bear the financial burdens of creating new affordable housing as a mandatory condition for permit approval. *Id*. at A–36, 39. But, relying at the *Koontz* dissent, the court concluded that the question whether such a condition was an exaction remained an "ambiguity" in federal unconstitutional conditions law, which the court would not attempt to resolve because the case could be decided on different grounds. Pet. App. A–33-34, n.11. Therefore, rather than reviewing the condition subject to *Nollan*, *Dolan*, and *Koontz*, the court instead likened the affordable housing condition to a tax or price control measure, entitled only to rational basis review. Pet. App. A–36, 43.

Second, the California Supreme Court held that *Nollan* and *Dolan* only apply to conditions imposed as part of an ad hoc administrative proceeding—not conditions required by legislation. *Id.* at A–34, n.11. Again, the court found this Court's precedents "ambiguous"on that point. *Id*. (citing *Koontz* dissent). Relying again on state cases interpreting the federal constitution, the court explained that "legislatively prescribed monetary fees imposed as a condition of development are not subject to the *Nollan / Dolan* test." *Id*. at A–34, n.11 (quoting *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 663-671

(2002)). According to the California courts, development exactions are subject to heightened scrutiny *only* where the dedication was actually intended to mitigate for an impact of the proposed development. *Id.* at A–51-53, 58. When the legislature imposes an exaction intended to provide a public benefit "unrelated to the impact of the proposed development" (*id.* at A–55), such conditions are also only subject to minimal, rational basis review—*i.e.*, whether the condition is reasonably related to a public interest:

> [W]hen a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.

Id. at A–58-59.

Because the affordable housing condition was not intended to mitigate for any impacts of new development, the California Supreme Court held that neither the onsite dedication nor in-lieu fee were subject to heightened scrutiny under *Nollan* and *Dolan*:

> [T]he validity of the ordinance's requirement that at least 15 percent of a development's

> for-sale units be affordable to moderate or low-income households does not depend on an assessment of the impact that the development itself will have on the municipality's affordable housing situation. Consequently, the validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need.

Pet. App. A–63. Accordingly, the California Supreme Court affirmed the court of appeal on different grounds and remanded the case for consideration under the "reasonably relates to the public welfare" test.[3] Pet. App. A–26, 73.

CBIA now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important questions of federal law decided below.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This case raises an important issue concerning the limitations that the Takings Clause of the Fifth Amendment of the U.S. Constitution places on a government's authority to use the permit process to force private property owners to dedicate private

[3] Because the city and intervenors argued for application of the "substantially relates" test, neither challenged the trial court's findings of fact that the affordable housing condition was not related to any impacts caused by new residential development.

property to a public use. In the decision below, the California Supreme Court created a rule of federal law that allows the government to circumvent the nexus and proportionality analysis set out by this Court in *Koontz*, 133 S. Ct. 2586, *Dolan*, 512 U.S. 374, and *Nollan*, 483 U.S. 825, whenever the permit condition is required by legislation.

In place of the nexus and proportionality tests, the lower court held that legislatively-mandated conditions are subject only to rational basis review to determine whether the condition reasonably relates to the public welfare. Pet. App. A–26, 73. Under that rule, permit conditions that are wholly unrelated to the impacts of development will be found lawful so long as the condition advances the public interest. *Id.* at A–63. That test, however, was rejected by this Court ten years ago in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43 (2005), because it fails to address the protections guaranteed by the Fifth Amendment and the unconstitutional conditions doctrine. Not only does the California decision depart from this Court's precedent, it deepens a longstanding split of authority among the lower courts regarding the scrutiny applied to legislatively-mandated exactions, both of which conflicts warrant certiorari.

I

THE CALIFORNIA COURT'S REFUSAL TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS CONFLICTS WITH DECISIONS OF THIS COURT

The California Supreme Court's decision adopted a rule that excludes well-recognized property rights

from the protections guaranteed by the unconstitutional conditions doctrine.

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 133 S. Ct. at 2599; *see also Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may only require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving the public property that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property."). The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners "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 property it would like to take." *Koontz*, 133 S. Ct. at 2594; *see also id.* at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because

they take property but because they impermissibly burden the right not to have property taken without just compensation.").

To qualify for protection under *Nollan* and *Dolan*, a landowner only needs to show that the demand, if imposed directly, would entitle the owner to just compensation. *Id*. In other words, the demand must seek an interest in private property. Contrary to the decision below, the term "property" is not limited to parcels of land. *See Koontz*, 133 S. Ct. 2599-2600. Instead, property refers to the collection of protected rights inhering in an individual's relationship to his or her land or personal property, including an owner's financial investment in his or her property. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Horne v. Dep't of Agric.*,135 S. Ct. 2419, 2426 (2015) (crops); *Koontz*, 133 S. Ct. at 2601 (money and real property); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005) (homes); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (interest on legal trust accounts); *Phillips v. Washington Legal Foundation*, 524 U.S. 156,159 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 44-49 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages). Among these are the rights to possess, use, exclude others, and dispose of the property. *General Motors*, 323 U.S. at 378. Thus, when the government demands that an owner hand over an interest in private property, its demand constitutes a taking for which just compensation is due. *See*, *e.g.*, *Horne*, 135 S. Ct. at 2428 (order demanding surrender of raisin crop as a condition of selling remaining raisins constituted a taking); *Koontz*, 133 S. Ct. at 2600 (a condition demanding money in lieu of a land dedication is subject to the same

constitutional protections as a demand for land); *Brown*, 538 U.S. at 235 (applying per se rule to a taking of interest from a legal trust account).

The City's affordable housing dedication constitutes an exaction subject to *Nollan* and *Dolan* because it conditions permit approval upon the transfer of well-recognized interests in property to the city. Specifically, the ordinance requires developers to dedicate the following:

> (1) a financial interest in the dedicated homes, which is (a) valued at the difference between the market and affordable price, as defined in the ordinance, and (b) secured by a deed of trust or other recorded conveyance;
>
> (2) the right to freely alienate property; and
>
> (3) the right to sell property at a fair market price; or
>
> (4) a fee in lieu.

Each of those demands seeks the transfer of a well-recognized interest in property.[4] Owners have a right to their money, including their investment in their property. Owners also have a well-recognized right to sell their property to whom they choose, at a price they choose. *See Horne*, 135 S. Ct. at 2429 (finding a taking even where the government shares in the sale proceeds of seized raisins because "the growers

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[4] Notably, the condition at issue in *Nollan* did not require a formal conveyance of the demanded land as the California court assumes; instead, it required the owners to record a deed restriction acknowledging the public's right to pass across a portion of the beachfront property. *Nollan*, 483 U.S. at 858 (Brennan, J., dissenting).

lose any right to control their disposition."); *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 191-92 (1936) ("[T]he right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments."); *see also Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983) ("The ability to sell and transfer property is a fundamental aspect of property ownership.");[5] *see also Laguna Royale Owners Ass'n. v. Darger*, 174 Cal. Rptr. 136, 144 (Ct. App. 1981) (recognizing an owner's right to use and dispose of property as he chooses); *Ex parte Quarg*, 84 P. 766, 767 (1906) (An owner of property has a "clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain."); Cal. Civ. Code § 711 (a property owner has the right to freely alienate property, and to be free from unreasonable restraints on alienation of property).

The California Supreme Court's rule, however, refuses to protect those well-recognized rights. Insofar as the lower court concluded that the protection of those rights was rendered "ambiguous" by the dissenting opinion in *Koontz*, or by state case law interpreting the federal constitution, the opinion below raises an important question of federal takings law that warrants review.

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[5] *Disapproved of on other grounds by Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261 (1984).

II

THE CALIFORNIA COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO LEGISLATIVELY-MANDATED EXACTIONS RAISES A QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The California Supreme Court carved out a massive exception to *Nollan* and *Dolan* when it held that conditions imposed on development permits by operation of a legislative act are immune from those decisions' heightened scrutiny. Pet. App. A–26, 34 n.11, 73.

A. This Court Has Repeatedly Held Legislatively-Mandated Exactions Subject to the Unconstitutional Conditions Doctrine

There is no basis in this Court's case law for the distinction that the California court relies on to afford lesser scrutiny to legislatively-mandated exactions. In fact, this Court's exactions decisions belie any distinction whatsoever. *Nollan*, *Dolan*, and *Koontz* all involved conditions mandated by general legislation—a fact specifically noted in each of the opinions. The dedication of the Nollans' beachfront, for example, was required by a state law. *Nollan*, 483 U.S. at 828-30 (California Coastal Act and California Public Residential Code imposed public access conditions on all coastal development permits); *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43

shoreline new development projects in the Faria Family Beach Tract."). Both the bike path and greenway dedications at issue in *Dolan* were mandated by city land-use planning ordinances. *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). And the in-lieu fee at issue in *Koontz* was required by state law. *Koontz*, 133 S. Ct. at 2592 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

Nor does the legislative/adjudicative distinction find any support in the unconstitutional conditions doctrine. This Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals since the doctrine's origin in the mid-Nineteenth Century.[6] The

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[6] *See Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution of laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement

(continued...)

reason why the doctrine applies without regard to the type of government entity making the unconstitutional demand is made clear by the doctrine's purpose. The unconstitutional conditions doctrine is intended to enforce a Constitutional limit on government authority:

> [T]he power of the state [. . .] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).[7]

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[6] (...continued)
of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

[7] *See also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if (continued...)

Given this body of case law, two Justices expressed marked skepticism at the very idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10% of the paved area at an estimated cost of $12,500 per lot. 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Despite an apparent lack of proportionality, Georgia's Supreme Court upheld the ordinance, concluding that legislatively-imposed exactions are not subject to *Nollan* and *Dolan*. *Id*. at 1117. The dissenting Justices stated that there appeared to be no meaningful distinction between legislatively-imposed conditions and other exactions:

> 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. Moreover, the general

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[7] (...continued)
it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.").

> applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18 (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Both Justices argued that the question presented warrants review because it raises a substantial question of federal constitutional law. *Id*. at 1118.

Legal scholars also find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999). Indeed, it is often difficult to distinguish one from the other. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context). The irrelevance of the "legislative v. administrative" distinction comes as no surprise, because *Nollan* and *Dolan* are rooted in the unconstitutional-conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of

government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power." *Id.* at 438. Indeed, from the property owner's perspective, he suffers the same injury whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit.

B. Holding Legislative Exactions Subject Only to a "Reasonably Related to the Public Welfare" Test Fails To Protect the Rights Guaranteed by the Fifth Amendment

The California Supreme Court ruled that a Fifth Amendment challenge to a legislatively-imposed condition on a development permit is subject to rational basis review to determine whether the condition reasonably relates to the public welfare. Pet. App. A–26, 73. That standard, however, is meaningless in the context of the Takings Clause because it cannot protect against an uncompensated taking of private property for public use and is thus antithetical to this Court's takings jurisprudence.

In *Lingle*, this Court rejected the "substantially advances a legitimate government interest" test as a takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." 544 U.S. at 542 (emphasis omitted). "A test that tells us

nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Id.* at 543. Thus, a determination that a regulation serves a public need, without more, is not sufficient to justify a regulation that appropriates property for a public use. *Id.* at 542-43; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

By circumventing the analysis required by *Nollan* and *Dolan*, the California rule shifts the takings inquiry away from the severity of the burden imposed, and focuses instead upon *how* it has been imposed. Under this formulation, the same burdensome exaction may be upheld if imposed legislatively, but struck down as a taking if imposed adjudicatively. This is precisely the result that *Lingle* pronounced to be incongruent with the Takings Clause. *Id.* at 543. *Lingle* provides that, if two landowners are identically burdened by regulatory acts, "[i]t would make little sense to say that the second owner had suffered a taking while the first had not." *Id.*

Lingle's pronouncement that identical regulatory burdens should be treated equally under the Takings Clause is no less true in the exactions context, and the court below improperly held otherwise. As with the other takings tests, *Nollan* and *Dolan* focus upon the severity of the burden imposed. *Id.* at 547 ("*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would

be deemed *per se* physical takings."). *Lingle* recognized that *Nollan* and *Dolan* amounted to takings because the exactions imposed in those cases were functionally equivalent to physical invasions; however, where government physically invades a property, it effects a taking whether the legislature authorizes the invasion or not.[8] Therefore, if *Nollan* and *Dolan* are indeed functionally equivalent to physical invasions, the fact that the legislature authorized the imposed conditions is irrelevant to the analysis.

C. Holding Legislative Exactions Subject Only to a "Reasonably Related to the Public Welfare" Test Conflicts with the Anti-Coercion Purpose of the Unconstitutional Conditions Doctrine

The California rule also threatens to undermine the anti-coercion underpinnings of the nexus and proportionality tests. *See Koontz*, 133 S. Ct. at 2594 (The doctrine of unconstitutional conditions "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). The doctrine prevents the government from taking advantage of permitting to exact excessive or unrelated benefits from a landowner. *See Nollan*, 483 U.S. at 837 (The government's demand for a public easement was "an out-and-out plan of extortion" because there was not a sufficient connection between the demand and the proposed development.).

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[8] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (invalidating statute requiring that owners of apartment building allow private companies to install cable boxes on the buildings).

By designating public need as the sole determinative factor when a legislative exaction is challenged, the California rule endorses the very type of opportunistic taking of property that this Court expressly disallowed in *Nollan* and *Dolan*. In *Dolan*, this Court explained that nexus and proportionality analysis is necessary to determine whether a development condition is "'merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.'" *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

The analysis required by *Nollan* and *Dolan* is especially important where the government seeks to exact benefits relating to popular policy goals, such as affordable housing. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."). In these circumstances, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v.*

Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

That is precisely the issue in this case. The City of San Jose considered spreading the cost of addressing its affordable housing needs across different segments of its population, but ultimately decided to meet its housing needs by requiring private developers to build and sell homes at below-market prices to city-designated, low-income buyers. Pet. App. A–13-14. Based on that decision, the city targeted new residential development—despite the fact that it had no evidence showing that the developments affected the availability of low income housing—to be subject to an affordable housing exaction as a condition of receiving permit approvals to build new homes. There is no question that the city could have implemented its policy by condemning land or existing buildings for a public use. *See United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). But instead, the City's shortcut of making its demand in the form of a permit condition circumvents the just compensation requirement.

The decision below endorses the shortcut by focusing solely on whether the exaction advanced a public need, rather than evaluating the relationship between the exaction and the proposed development. By doing so, the California court removed any effective limit on the City's authority to take private property without compensation. The California court's decision operates as an exception, which may effectively swallow the rules and policy this Court set out in to *Nollan*, *Dolan*, and *Koontz*. This Court should not allow such a troubling decision to stand unreviewed.

III

THERE IS A SPLIT OF AUTHORITY AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS MANDATED BY LEGISLATION

Courts across the country are split over the question of whether legislatively imposed permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (recognizing a nationwide split of authority). For example, the Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound*, 135 S.W.3d at 641; *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1994); *Trimen Development Co. v. King Cnty.*, 877 P.2d 187, 194 (Wash. 1994).

On the other hand, the Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See*, *e.g.*, *Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty.*

Home Builders Ass'n v. City of Pell City, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion, the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1083, n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*).

This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because, due to San Jose's factual concessions, it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the exaction, a constitutional violation occurred. *See* Pet. App. B–14. ("[T]he Ordinance at issue here does not appear to have been enacted for the purpose of mitigating housing loss

caused by new residential development."). The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions that are imposed pursuant to a legislative mandate. As Justice Kagan noted in her dissent to the *Koontz* decision, the fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." *Koontz*, 133 S. Ct. at 2608. That observation holds true for every decision seeking a dedication of property in exchange for a permit approval. This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: September, 2015.

Respectfully submitted,

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