IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

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616 CROFT AVE., LLC, et al.,

Petitioners,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

After an Opinion by the Court of Appeal,
Second Appellate District, Division One
(Case No. B266660)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC498004, Honorable Luis A. Lavin, Judge)

PETITION FOR REVIEW

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QUESTIONS PRESENTED FOR REVIEW

Shelah and Jonathan Lehrer-Graiwer applied to the City of West Hollywood for permits necessary to redevelop two residential lots into an infill 11-unit condominium. The City issued the permits subject to a condition that the owners pay a $540,393.28 in-lieu affordable housing fee. The City offered no evidence that the fee bore any relationship to impacts caused by the Lehrer-Graiwers' condominium project; instead, it simply imposed the fee pursuant to a schedule enacted by the City Council. The owners paid the fee under protest and then challenged it as an unconstitutional exaction under *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 Water Management District*, 133 S. Ct. 2586 (2013). Together, those cases hold that the government cannot lawfully exact a property interest as a permit condition unless it can show that the exaction is sufficiently related in size and scope to mitigate for an adverse public impact caused by the proposed land use. The Court of Appeal refused to consider the constitutional claim, holding that, as a matter of law, legislatively mandated conditions are not subject to *Nollan* and *Dolan*.

The question presented is:

Whether a legislatively mandated, low-income housing condition must satisfy the "essential nexus" and "rough proportionality" standards set out by *Nollan*, *Dolan*, and *Koontz*, and as incorporated by West Hollywood

Municipal Code (WHMC) § 19.64.010, where the condition demands a dedication of private property or an in-lieu fee.

INTRODUCTION

Pursuant to California Rule of Court 8.500(a)(1), Petitioners Shelah and Jonathan Lehrer-Graiwer and 616 Croft Ave., LLC (the Lehrer-Graiwers), hereby submit the following Petition for Review of the published decision of the Court of Appeal, Second Appellate District, filed on September 23, 2016, entitled *616 Croft Ave., LLC, et al. v. City of West Hollywood*, slip op. No. B266660, a copy of which is attached as Exhibit A (Opinion). No petition for rehearing was filed. This Petition for Review follows the Court of Appeal's entry of judgment.

A. The City Imposes a Half-Million Dollar In-lieu Affordable Housing Fee on the Lehrer-Graiwers' Demolition and Building Permits

The Lehrer-Graiwers are the owners and developers of an infill 11-unit condominium project located at 612-616 North Croft Avenue in the City of West Hollywood. In 2004, the Lehrer-Graiwers applied to the City for permits necessary to redevelop two adjacent single-family homes into a small condominium complex. The City approved the project in 2005, praising the project's "superior architectural design" and noting that the development will provide "11 families with a high quality living environment." City of West Hollywood Res. No. 05-3268, § 4(4) (AR 0470). The Council also determined

that the net gain of nine new residential units "would help the City achieve its share of the regional housing need." *Id.* Despite this finding, the City demanded that the owners either dedicate affordable housing units to the public or pay an in-lieu fee (in an amount to be determined when the owners applied for building permits and began construction) as a condition of permit approval. Opinion at 2-3; *see also* AR 0473-0485.

The City's inclusionary housing ordinance, WHMC § 19.22.010, *et seq.*, requires developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an in-lieu fee to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. WHMC §§ 19.22.030-19.22.040. If the owner opts to dedicate housing units, the City code requires that the owner first offer the set-aside units to any eligible households displaced by demolition at a price set by the City, then give the City—or any City-designated agency or organization—a right of first refusal to purchase any or all inclusionary set-aside units. WHMC § 19.22.090, subd. (C). If the owner is eligible to pay an in-lieu fee, the money is placed into the City's "affordable housing trust fund" where it is used to subsidize the provision of affordable housing. WHMC § 19.22.040. The City calculates the in-lieu fee according to a legislatively adopted schedule, which authorizes the City to require developers to "pay an *equitable share* of the cost of *mitigating the impacts of their project* . . . on community services and facilities." WHMC

§ 19.64.010 (emphasis added). Nonetheless, the fee schedule contains no provision for varying the size of the affordable housing fee based on project-specific circumstances.

Shortly after the City approved the project, the housing market crashed. At the Lehrer-Graiwers' requests, the City extended its permit approvals several times between July, 2008, and December, 2011. Opinion at 3. During that time, the City drastically revised its fee schedule, doubling its affordable housing fees. *Id*. Thus, when the Lehrer-Graiwers applied for the necessary permits in December, 2011, City staff conditioned issuance of the demolition and building permits upon payment of four "exaction fees" totaling $581,651.15. Opinion at 3; AR 0684. At issue in this petition is the City's demand for a $540.393.28 "In-Lieu Housing Fee or Affordable Housing Fee." *Id*.

B. The Lehrer-Graiwers Satisfy the Legal Requirements for Preserving Their Challenge to the Permit Condition

Acting through their successor company, 616 Croft Ave., LLC, the Lehrer-Graiwers objected and requested that the City review the timing and amounts of its fees. City staff refused to reconsider the fees and refused to defer or extend the time for payment of the exaction fees. On December 22, 2012, facing forfeiture or termination of their development approvals, the Lehrer-Graiwers paid the full $581,651.15 under protest. AR 0686. The owners also requested that the City Council conduct an administrative review

of the disputed exaction fees as provided by WHMC § 19.64.040(C). AR 0689.

When the City did not respond to the request, the Lehrer-Graiwers filed a lawsuit, seeking in part to invalidate the low-income housing in-lieu fee under the "essential nexus" and "rough proportionality" tests set out by *Nollan*, *Dolan*, and *Koontz*, and as those tests are incorporated into WHMC § 19.64.010.[1] Opinion at 3-4; Appellant's Opening Br. at 25. Together, the nexus and proportionality tests hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate adverse public impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95, 2599.

The City eventually agreed to conduct an administrative hearing. During that proceeding, City staff took the position that the exaction fees constituted "land use regulations" instead of exactions, and argued that the City did not need to provide any evidence establishing a reasonable relationship between the housing fees and the impacts of the project. AR 0751-0752, 0827. Accordingly, the City provided no evidence of nexus and proportionality and further admitted that there was no evidence showing

[1] The City Code limits the City's authority to exact those fees that are necessary "to ensure that project applicants pay an equitable share of the cost of mitigating the impacts of their project . . . on community services and facilities." WHMC § 19.64.010.

that the fees constituted the owners' "equitable share" of the cost of mitigating any impacts caused by that development. *Id.* Despite a complete lack of any connection between the condominium proposal and the City's affordable housing needs, the City Council upheld the in-lieu affordable housing fee.[2] Opinion at 4.

The trial court also upheld the exaction, dismissing the Lehrer-Graiwers' constitutional claim. JA 0326-0338. Importantly, however, the trial court acknowledged that "the City admits" that the need for affordable housing in the City of West Hollywood "predates the project"—a finding that plainly demonstrates a lack of both nexus and proportionality. *Id*. But in place of *Nollan*/*Dolan* scrutiny, the trial court held that the reasonable relationship test applied only to general acts of legislation—here, the adopted fee schedule—and not to the actual fee condition placed on the Lehrer-Graiwers' permits. Under that standard, the court held that the City was not required to show that the Petitioners' development "caused a need for affordable housing . . . ." JA 0326-0338. Based on that ruling, the Lehrer-Graiwers voluntarily dismissed their remaining claims in order to immediately appeal the court's judgment. JA 0433. Final Judgment was entered on August 12, 2015. JA 0440.

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[2] The City Council granted relief as to one of the four disputed exaction fees. That fee is not at issue in this appeal. Opinion at 4.

C. The Court of Appeal Holds That Legislatively Mandated Affordable Housing Fees Are Exempt from *Nollan*/*Dolan* Scrutiny

The Court of Appeal held that the Lehrer-Graiwers' constitutional claim was wholly controlled by this Court's recent decision in *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 443-44 (2015) (*CBIA*). Although *CBIA* is plainly limited to those permit conditions *that do not exact a property interest* (*id.*), the Court of Appeal read that decision as broadly exempting all affordable housing conditions from the constitutional standards set out in *Nollan*, *Dolan*, and *Koontz*. Opinion at 7-9. Thus, despite acknowledging that there were differences between the conditions imposed in *CBIA* and the present case, the Court of Appeal refused to analyze the City's affordable housing ordinance to determine whether it demanded a dedication of a property. Opinion at 9. The court also held that any challenge to the size of a legislative exaction must be brought in a facial challenge at the time the City enacts its fee schedule—according to the lower court, a property owner is barred from seeking judicial relief under *Nollan* and *Dolan* after the fee is imposed on a permit approval. Opinion at 5. Based on those conclusions, the court declined to address the owners' *Nollan* and *Dolan* claim and failed to address the owners' challenge based on the nexus and proportionality requirements of WHMC § 19.10.010, upholding the City's decision to impose

a massive fee on permit approvals despite the City's admission that the fee was unrelated to any project impacts. Opinion at 5, 7-9.

REASONS FOR GRANTING REVIEW

The Court should review this case in order "to secure uniformity of decision" and to "settle . . . important question[s] of law." Cal R. Ct. 8.500(b)(1). First, the Court of Appeal's opinion undermines important constitutional protections guaranteed to property owners in the land-use permitting context by holding a broad category of legislatively imposed exactions to be exempt from the "nexus" and "proportionality" tests as set out by U.S. Supreme Court in *Nollan*, *Dolan*, and *Koontz*, and as incorporated by WHMC § 19.10.010. Those cases establish that the Constitution allows only those permit conditions that mitigate negative impacts caused by the property owner's proposed use. To qualify for protection under *Nollan*, *Dolan*, and *Koontz*, the permit applicant must demonstrate that the condition demands an interest in private property. *Koontz*, 133 S. Ct. 2599-2600. Relatedly, the California Supreme Court has held that a permit condition *that does not exact a property interest* is not subject to heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*. *See CBIA*, 61 Cal. 4th at 443-44. The Court of Appeal's decision to exclude legislatively mandated conditions from the requirements of *Nollan*, *Dolan*, and *Koontz*—without regard to whether the condition demands the dedication of a property interest—creates confusion and uncertainly for

landowners and government alike about how and when the doctrine of unconstitutional conditions applies.

Second, the lower court's refusal to determine whether the City's affordable housing ordinance demanded a dedication of private property, before ruling on whether the doctrine of unconstitutional conditions applies, conflicts with well-settled precedents from this Court and the U.S. Supreme Court. Indeed, by focusing solely on the character of the government body that demands an exaction, the lower court adopted a rule that undermines the anti-coercion policy advanced by *Nollan*, *Dolan*, and *Koontz*. The Court of Appeal's judgment, therefore, exposes property owners to the very type of extortionate permit conditions that the nexus and proportionality tests are designed to prevent. Review is both warranted and necessary.

ARGUMENT

I

REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION WHETHER LEGISLATIVELY IMPOSED EXACTIONS ARE SUBJECT TO *NOLLAN*, *DOLAN*, AND *KOONTZ*

The Court of Appeal's decision erroneously read *CBIA* as establishing a per se rule that excludes *all* legislatively imposed affordable housing conditions from the protections guaranteed by the unconstitutional conditions doctrine as set out by *Nollan*, *Dolan*, and *Koontz*. Opinion at 7-9. Thus, despite acknowledging that the West Hollywood ordinance was different from

the ordinance at issue in *CBIA*, the Court of Appeal refused to determine whether it demanded a dedication of property. Opinion at 7-9. That was an error of constitutional magnitude in three regards. First, the purpose of a regulation is irrelevant to any takings inquiry. Second, unlike the ordinance at issue in *CBIA* (which did not require any transfer of private property rights, *CBIA*, 61 Cal. 4th at 443-44, 461), West Hollywood's ordinance plainly demands that owners transfer well-recognized property rights (including a right of first refusal), or an in-lieu fee, to the public. Third, the U.S. Supreme Court has repeatedly held legislative exactions subject to the nexus and proportionality requirements. The Court of Appeal's refusal to analyze the ordinance under heightened scrutiny is in conflict with binding U.S. Supreme Court precedent.

A. *Nollan*, *Dolan*, and *Koontz* Prohibit Extortionate Permit Conditions

Property owners are at their most vulnerable to governmental abuse when they must seek a permit to use their property. The nexus and rough proportionality tests established by *Nollan*, *Dolan*, and *Koontz* are aimed at safeguarding private property rights from abuse in the context of land-use permit decisions. *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.'"). 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. *Nollan*, 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 takings 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.

The U.S. Supreme Court agreed, holding that the easement condition was invalid because it lacked an "essential nexus" to the alleged public impacts caused by the Nollans' project. *Id.* at 837. The Court found that because the Nollans' home reconstruction 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*, the U.S. Supreme 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. *Dolan*, 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. The 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.*

In *Koontz*, the U.S. Supreme Court held that fees imposed in lieu of dedication of property must also comply with the nexus and proportionality

requirements. In that case, a government permitting agency conditioned the approval of Coy Koontz's application to develop 3.9 acres of his 14.9-acre commercial-zoned property. 133 S. Ct. at 2593. Koontz offered to give the agency a conservation easement over the remaining 11 acres, but that was not enough. *Id*. The agency demanded that Koontz either dedicate 13.9 acres of his land or pay a fee in lieu of the additional demanded property. *Id*. Koontz objected to the condition and the agency denied his application. *Id*. Koontz challenged the agency's decision as a violation of the doctrine of unconstitutional conditions. *Id*. On review, the U.S. Supreme Court confirmed that an in-lieu fee is often the "functional equivalent" of an exaction of land. *Id*. at 2599. Thus, as a threshold matter, courts considering a monetary exactions claim must first analyze the entire demand imposed by the government to determine whether "it would transfer an interest in property from the landowner to the government." *Id*. at 2900. If so, then the in-lieu fee constitutes an exaction subject to the nexus and proportionality tests. *Id.*

Koontz further explained that the nexus and proportionality 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.").

The Court of Appeal departed from binding decisions of the U.S. Supreme Court when it focused on the purpose for the City's affordable housing exaction as being determinative of whether the *Nollan*/*Dolan*/*Koontz* test applied—particularly where the City Code requires that all impact fees satisfy nexus and proportionality. The unconstitutional conditions doctrine "does not implicate normative considerations about the wisdom of government decisions," nor posit whether the exaction is "arbitrary or unfair." *Koontz*, 133 S. Ct. at 2600. Instead, the Court's task is to determine whether the exaction

demanded by the City as a condition on new residential development bears the "required degree of connection between the exactions imposed by the [county] and the projected impacts" of the property owner's proposed change in land use. *See Dolan*, 512 U.S. at 377.

B. The Court of Appeal's Refusal to Recognize Well-Settled Property Rights Conflicts with Decisions of the U.S. Supreme Court

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. *Koontz*, 133 S. Ct. at 2599-2600. In other words, the permit condition must demand an interest in private property. *Id.* 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); *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 (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*, *Dolan*, and *Koontz* because it conditions permit approval upon the transfer of several well-recognized interests in property to the City. Specifically, the ordinance requires developers to dedicate the following:

(1) the right of first refusal (WHMC § 19.22.090(c));

(2) the right to freely alienate property (WHMC § 19.22.090(a), (b)); and

(3) the right to sell property at a fair market price (WHMC § 19.22.090(f)); or

(4) an in-lieu fee (WHMC § 19.22.040).

Each of those demands seeks the transfer of a well-recognized interest in property. *See Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207-08 (2013) ("Compelling the developer to give the City a purchase option is an exaction[.]"). 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—which includes a right of first refusal. *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 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*, 142 Cal. App. 3d 72, 88-89 (1983) (A right of first refusal is a property right.);[3] *see also Laguna Royale Owners Ass'n v. Darger*, 119 Cal. App. 3d 670, 682-83 (1981) (recognizing an owner's right to use and dispose of property as he chooses); *Ex parte Quarg*, 84 P. 766, 767 (Cal. 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). Indeed, the City itself characterized its in-lieu fee as an "exaction." AR 0684. The Court of

[3] *Disapproved of on other grounds by Fisher v. City of Berkeley*, 37 Cal. 3d 644 (1984); *see also Manufactured Hous. Cmtys. of Wash. v. Washington*, 142 Wash. 2d 347 (2000) (statute which gave mobile home park tenants a right of first refusal, and took away such right from owner, was a taking even though it would benefit members of the public).

Appeal's rule, however, refuses to acknowledge—let alone protect—those well-recognized rights.

C. The U.S. Supreme Court Has Repeatedly Held Legislatively Mandated Exactions Subject to the Unconstitutional Conditions Doctrine

There is no basis in the U.S. Supreme Court's case law for the distinction that the Court of Appeal relies on to afford lesser scrutiny to legislatively mandated low-income housing exactions. In fact, the U.S. Supreme 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. The U.S. Supreme 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.[4] The reason why the doctrine applies without regard to the type of

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[4] *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 "[t]his 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 of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or removing 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 (continued...)

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 v. R.R. Comm'n of State of Cal., 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).[5]

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*

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[4] (...continued)
for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

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

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.

In sum, the Court of Appeal's decision constitutes a significant departure from existing precedents (and the City's own code, which subjects

exaction fees to a nexus and proportionality analysis). The decision would insulate legislative demands for private property from constitutional review, causing serious ramifications for all property owners in the State. The Court should resolve the conflict and confusion generated by the lower court's judgment and grant the petition.

II

REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S DECISION UNDERMINES THE ANTI-COERCION POLICY OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. 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 Court of Appeal ruled that a challenge to a legislatively imposed condition on a development permit is subject only to rational basis review to determine whether the condition reasonably relates to the public welfare, regardless of whether the exaction demands a dedication of private property. Opinion at 5, 7-9. 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*. That test, however, was rejected by the U.S. Supreme 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.

In *Lingle*, the 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*, *Dolan*, and *Koontz*, the Court of Appeal's decision 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 the result that *Lingle* pronounced to be incongruent with the Takings Clause. 544 U.S. 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, the nexus and proportionality tests 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.[6]

B. 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 lower court's decision also threatens to undermine the anti-coercion rationale 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

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

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.

By designating public need as the sole determinative factor when a legislative exaction is challenged, the decision below endorses the very type of opportunistic taking of property that the U.S. Supreme Court expressly disallowed in *Nollan* and *Dolan*. *Dolan* 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 West Hollywood could have spread 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. 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 Court of Appeal removed any effective limit on the City's authority to take private property without compensation. The lower court's decision operates as an exception, which may effectively swallow the rules and policy that the U.S. Supreme Court set out in to *Nollan*, *Dolan*, and *Koontz*. This Court should not allow such a troubling decision to stand unreviewed.

CONCLUSION

The Court of Appeal's decision is plainly inconsistent with *CBIA* and is in direct conflict with *Nollan*, *Dolan*, and *Koontz*. Review is particularly warranted in this case because the lower court's adoption of a per se rule that excuses the government from the constitutional nexus and proportionality requirements when the legislature—rather than some other government body—demands money or property as a condition of a permit approval would effectively undermine *Nollan*, *Dolan*, and *Koontz* if allowed to stand. *See Koontz*, 133 S. Ct. at 2602-03. The applicability of the nexus and proportionality tests must turn on whether a permit condition exacts property, not the government's reason for making the demand. Both the Constitution and the City Code limit the City's authority to exact fees as a condition of permit approval to only those fees that are necessary to mitigate adverse project impacts. The Court of Appeal's refusal to address the nexus and rough

proportionality tests raises an important question of constitutional law and warrants review by this Court.

DATED: November 1, 2016.

Respectfully submitted,

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By_____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 6,518 words.

DATED: November 1, 2016.

_____
LAWRENCE G. SALZMAN

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On November 1, 2016, a true copy of PETITION FOR REVIEW was placed in an envelope addressed to:

GREGG W. KETTLES
Jenkins & Hogin LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266

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California Court of Appeal,
Second Appellate District, Division One
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2nd Floor, North Tower
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THE HONORABLE LUIS A. LAVIN
Superior Court of Los Angeles County
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 1st day of November, 2016, at Sacramento, California.

_____

BARBARA A. SIEBERT