No. 16-1137

In The
Supreme Court of the United States

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616 CROFT LLC, and JONATHAN & SHELAH LEHRER-GRAIWER,

Petitioners,

v.

CITY OF WEST HOLYWOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND OWNER'S COUNSEL OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(b), *Amici Curiae*, the National Federation of Independent Business ("NFIB") Small Business Legal Center and Owners' Counsel of America ("OCA") respectfully request leave of this Court to file the following brief in support of the petitioners in the above captioned matter. In support of the motion, the *amici* state:

1. On March 23, 2017 the Petitioners filed a letter with the Clerk's Office consenting to all amicus filings in accordance with Supreme Court Rule 37(2)(a).

2. Thereafter, on behalf of the listed *amici*, the NFIB Small Business Legal Center requested consent from Respondent to file an *amici curiae* brief in this case. This request was timely, in accordance with Supreme Court Rule 37.2.

3. The Respondent has chosen to withhold consent on the view that this "case raises only local issues." The listed *amici* respectfully disagree and seek to file the proposed brief to explain to the Court the nationwide implications of this case.

4. Specifically, the proposed brief will aid the Court in explaining the fundamental importance of the issue presented—which is a question over which the lower courts are split across the country. *Amici* believe that they offer valuable perspective and expertise, which will aid the Court in reviewing the petition.

5. NFIB Small Business Legal Center—representing the interests of the nation's small business community—has a great interest in this case. Likewise, OCA in its role as an advocate for property rights and a proponent of constitutional principles has a pressing interest in this case. Both groups have an interest in protecting the rights of individual and small business landowners against local and state authorities who may seek to leverage their permitting powers to force valuable concessions. The concern is that small business and individual landowners are vulnerable to extortionate demands for the dedication of monetary assets and other property interests during the permitting process.

6. The decision below raises an issue of grave concern because it allows municipalities to systematically circumvent the protections afforded to owners under the Takings Clause—as recognized in *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 Mgmt. Co.,* 133

S. Ct. 2586 (2013)—by *simply* enacting legislation requiring waiver of protected rights. The *Amici* wish to offer their expertise in explaining how this approach fundamentally conflicts with this Court's unconstitutional conditions doctrine.

7. Previously, the *Amici* have filed respective briefs in other takings cases before this Court—including in the *Koontz* case. Since then the *Amici* have devoted energy both in scholarship and in numerous *amicus* filings encouraging lower courts to embrace the full implications of the *Koontz* decision.

8. *Amici* have submitted respective statements of interest more fully explaining their organizational interests in this case.

Amici curiae respectfully request leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether a legislatively mandated permit condition requiring dedication of private property to public use should be subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)?

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INTEREST OF AMICI CURIAE[1]

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

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

The Owners' Counsel of America ("OCA") is an invitation-only network of the nation's most experienced eminent domain and property rights

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[1] In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person other than amici, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief.

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

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

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to reaffirm that that the Takings Clause applies—through incorporation in the Fourteenth Amendment—to all coordinate branches of state government with equal force. More to the point, this case should serve as an ideal vehicle to clarify that legislatively imposed exactions are subject to review under the unconstitutional conditions doctrine in the same manner as are exactions imposed at the discretion of executive actors. Given the severe split in authority among the lower courts on this recurrent (and immensely practical) question, it is vital that this Court should make clear that an "out-and-out plan of extortion" is just as repugnant to our

Constitution when imposed by legislation as when carried out by an administrative body.

The Respondent, City of West Hollywood ("City"), forces property owners into the same unconstitutional dilemma which faced James and Marilyn Nollan, Florence Dolan, and Coy Koontz. *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). Specifically, the Petitioners were forced to choose between their fundamental rights to either (a) obtain just compensation or (b) develop and use their property. Indeed, they were foreclosed from obtaining a building permit without dedicating significant monetary assets to fund the City's affordable housing program—*i.e.*, private property that the City could not have taken out right. *616 Croft Ave., LLC v. City of W. Hollywood*, 3 Cal. App. 5th 621, 625 (Cal. Ct. App. 2016) ("The City calculates the 'in-lieu' fee according to a schedule developed via resolution by the West Hollywood City Council…").

While that permitting condition would have unquestionably been subject to a heightened standard of review, under *Koontz*, if imposed at the discretion of executive actors—the California courts held that a much more deferential standard should apply in this case solely because the condition was imposed by dictate of an enacted ordinance. *616 Croft Ave.*, 3 Cal. App. 5th at 625; *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 860, 880–881 (Cal. 1996). But the constitutional injury is the same whether inflicted at the discretion of a lawless

zoning commission or a legislative body indifferent to an individual's constitutional rights. And the Takings Clause applies by the same terms regardless of which governmental entity has taken the lead in advancing confiscatory regulatory policies. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005); *Stop the Beach Renourishment v. Flordia Dep't. of Envtl. Prot.*, 560 U.S. 702 (2012).

REASONS FOR GRANTING THE PETITION

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

More than two decades ago, in *Nollan v. California Coastal Commission*, this Court ruled that permitting conditions requiring the dedication of private property (*i.e.*, an "exaction") must be reviewed under a heightened form of scrutiny. 483 U.S. 825 (1987). Later, in *Dolan v. City of Tigard*, this Court clarified that the burden rests on the permitting authority to demonstrate both that (a) the dedication requirement bears a nexus to some legitimate regulatory concern that might otherwise justify a permit denial and (b) the condition is roughly proportional to mitigate those cited regulatory concerns. 512 U.S. 374, 391 (1994). *Nollan* and *Dolan* explained that heightened scrutiny is necessary—under the "nexus" and "rough proportionality" tests—because otherwise state and local actors might leverage their permitting

authority to coercively force landowners to finance pet projects, or to give other 'goodies.' *Dolan*, 512 U.S. at 387; *Nollan*, 483 US. at 837 (emphatically warning that a stringent standard is necessary to prevent authorities from carrying out "plan[s] of extortion.") (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).

Later, this Court explained that *Nollan* and *Dolan* were rooted in the unconstitutional conditions doctrine. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 547 (2005). Most recently, in *Koontz v. St. Johns River Water Management District*, the Court reaffirmed this understanding—explaining that the unconstitutional conditions doctrine prohibits state and local authorities from withholding permit approval on a requirement to give-up constitutionally protected rights (*i.e.*, the right to "just compensation" for a taking). 133 S. Ct. 2586, 2594-95 (2013). That opinion resolved a long-running question as to whether *Nollan* and *Dolan* should apply in review of exactions requiring dedication of money to pay for public improvements or to enrich other public programs.[2] But, in doing so, *Koontz* has renewed a still lingering debate as to whether *Nollan* and *Dolan* should apply only in review of conditions imposed at the discretion of administrative bodies, or whether the nexus and rough proportionality tests also apply in review of conditions imposed by legislative enactments. *See e.g.*, Molly Cohen et al., Case Comment: *Revolutionary or Routine? Koontz v. St. Johns River*

[2] Compare *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001); with *Ehrlich*, 911 P.2d at 859.

Water Management District, 38 Harv. Envtl. L. Rev. 245, 257 (2014) (noting the possibility that courts might "apply *Koontz* to all impact fees, erasing the longstanding legislative/ad hoc distinction recognized by many states…"); John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1, 51 (2014) (criticizing *Koontz*, while (fretfully) acknowledging that the decision suggests heightened scrutiny in review of "legislative and executive branch action" alike).

A. The Lower Courts Are Deeply and Irreconcilably Divided on the Question as to What Test Should Apply in Review of Legislatively Imposed Conditions Requiring Dedication of Private Property to Public Use

A growing body of case law[3] and scholarship[4] now interprets *Koontz* as signaling that the

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[3] *Levin v. City and county of San Francisco*, 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014); *Horne v. Dep't of Agric.*, 750 F.3d 1128, 1142 (9th Cir. 2014) (applying the nexus and rough proportionality tests in review to a marketing order imposed on raisin producers under a New Deal era statute), abrogated by *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2015) (holding that a legislative requirement to surrender property as a condition of entering a regulated market constitutes a *per se* taking).

[4] *E.g.*, Marc J. Herman, *The Continuing Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions*, 46 URB. LAW. 655, 679-83 (2014) (refuting the purported distinction between adjudicative and legislative exactions); Kristoffer James S. Jacob, *California Building Industry Association v. City of San*

unconstitutional conditions doctrine should apply with equal force in review of exactions imposed by legislative enactments as when dedication requirements are imposed at the discretion of permitting authorities. Yet many jurisdictions persist in artificially cabining *Nollan* and *Dolan*—so as to apply the nexus and rough proportionality tests only in those cases where a condition is imposed at the discretion of some administrative body.

As demonstrated in this case, California is among those various jurisdictions that have embraced the legislative exactions exception. *616 Croft Ave.*, 3 Cal. App. 5th at 629; *California Building Indus. Assoc. v. City of San Jose*, 61 Cal. 4th 435, 470-71 (2015). These fractious jurisdictions apply a lesser—more deferential—standard of scrutiny under which legislatively imposed exactions are inevitably upheld. *West Linn Corporate Park, L.L.C. v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (concluding that the nexus and rough proportionality tests only apply in review of administrative decisions, not withstanding the acknowledgement that—at least in the Tenth Circuit—*Nollan* and *Dolan* claims have been "described … as a 'sub-category' of physical per se takings."). Accordingly, these courts will bless confiscatory regulatory conduct that would be deemed unconstitutional if carried out by the executive branch, so long as endorsed by a legislative body. *See E.g.*, *2910 Georgia Avenue LLC v. District of Columbia*, 2017 WL 598469 (D.D.C. 2017) (citing

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Jose: The Constitutional Price for Affordable Housing, 7 Cal. L. Rev. Online 101, 108-09 (2016).

California case law as persuasive authority in concluding that a less stringent standard should apply in review of exaction requirements imposed by generally applicable regulation). Yet, this legislative exactions exception is curious not only because the Takings Clause applies on equal terms to all coordinate branches of state government, but also because *Nollan*, *Dolan* and *Koontz* all involved statutorily imposed conditions.[5]

In any event, numerous other jurisdictions reject the so called legislative exactions exception. *See E.g.*, *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004). And there is no reason to believe that the lower courts will come to consensus without intervention from this Court. To be sure, the question has now persisted for 30 years. And while one might have hoped that the lower courts would find uniformity in light of the doctrinal guidance offered in *Koontz*, it is now plain that the they will remain irreconcilably conflicted. *See California Bldg. Indus. Ass'n v. City of San Jose, Calif.*, 136 S. Ct. 928 (2016) (Thomas J.,

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[5] Those courts accepting the so called legislative exception to *Nollan* and *Dolan* overlook the fact that, in *Nollan*, the Coastal Commission was merely imposing a condition required by the California Coastal Act, and that, in *Dolan*, the authorities were simply applying conditions imposed pursuant to the local zoning code. *See Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 377-78. Likewise, *Koontz* applied *Nollan* and *Dolan* in review of a monetary exaction imposed pursuant to the requirements of a Florida statute intended to protect wetlands. *See Koontz*, 133 S. Ct. at 2592. Accordingly, the purported distinction is wholly illusionary.

concurring) (noting that the "division shows no signs of abating."). Only this Court can provide a nationwide standard—which must necessarily repudiate one line of cases or the other.[6]

B. This Court Should Grant *Certiorari* to Reaffirm That the Takings Clause Applies with Equal Force to Protect Property Owners From Executive and Legislative Actors Alike

In explaining that *Nollan* and *Dolan* were unconstitutional conditions cases—and in elucidating the theoretical underpinnings of the unconstitutional conditions doctrine—the *Koontz* decision should have given reason for courts to reevaluate and back-away from the supposed legislative exactions exception. As Justice Alito explained, the unconstitutional conditions doctrine recognizes a constitutional injury in a government forced choice between (a) forgoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development—regardless of whether the condition is imposed as a term of an approved permit or as a precondition of permit approval. *Koontz*, 133 S. Ct. at 2595.

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[6] Compare *Waters Landing Ltd. P'Ship v. Montgomery Cnty.*, 650 A.2d 712 (Md. 1994) (refusing to apply *Nollan* and *Dolan* to legislatively imposed exaction requirements); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997) (same); *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008); with *B.A.M. Dev. L.L.C. v. Salt Lake City*, 196 P.3d 601, 604 (Utah 2008) (declining to distinguish between legislatively and administratively imposed exactions).

But if an unconstitutional violation occurs whenever government thrusts such a repugnant choice upon a landowner, then there can be no justification for treating legislatively imposed exactions any differently than those imposed on an *ad hoc* basis. *Id*. The injury is the same either way. To be sure, the Court has always applied the unconstitutional conditions doctrine just the same when reviewing conditions imposed by a statute. *See e.g.*, *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) (conditioning receipt of government funds on waiver of rights). Indeed, in the seminal unconstitutional conditions case, this Court struck down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

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

the identity of the public actor imposing the exaction. *See Stop the Beach Renourishment*, 560 U.S. at 715 (emphasizing that the Takings Clause is unconcerned with, which "particular state *actor* is" burdening property rights) (emphasis in the original). There is simply no justification for denying takings liability when the exaction is imposed pursuant to the terms of an enacted statute if the landowner suffers an identical injury to those injuries thrust upon the landowners in *Nollan*, *Dolan* and *Koontz*. *California Bldg. Indus. Ass'n*, 136 S. Ct. 928 (Thomas, J., concurring) ("I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'") (quoting *Parking Assn. of Georgia, Inc. v. Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of *certiorari*).

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

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

In *Dolan*, Justice Rehnquist noted a potentially relevant distinction between legislatively imposed exactions and those imposed as an "adjudicative decision" by a permitting authority. 512 U.S. at 385. But he offered no theoretical

grounding for why courts might "view legislatively imposed exactions in a different light—beyond the vaguely articulated concern that the court must be careful not to upset the presumption of constitutionality that generally applies when a zoning restriction is challenged." Luke Wake & Jarod Bona, *Legislative Exactions After Koontz v. St Johns River Management District*, 27 Geo. Int'l Envtl. L. Rev. 539, 558 (2015). In any event, the posited exception for legislatively imposed exactions is doctrinally inconsistent with the rule that government may not condition a permit approval on an extortionate requirement to dedicate property without just compensation. For one, an exception for legislative exactions would swallow the rule because permitting authorities invariably impose conditions in order to enforce the requirements of enacted statutes or zoning codes.

To be sure, land use authorities must necessarily act under the umbrella of some conferred statutory authority—since they have no power to impose restrictions on common law property rights in the absence of enabling legislation. *See* William Blackstone, 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P 41 (1959). Thus, the only potential distinction may be between cases where a statute or ordinance vests a permitting authority with a degree of discretion, and those cases where the enactment leaves the authority no choice but to impose the contested condition. Yet, *Koontz* makes clear that any potential distinction must find its roots in the unconstitutional conditions doctrine. And that venerable doctrine has never been concerned with the degree of discretion "vested in officials charged

with enforcing the law, but has instead applied equally in review of conditions imposed on an *ad hoc* basis or by the express terms of an enacted statute." See James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 437 (2009).

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

The prospect of acquiring property, without paying anything, is undoubtedly an attractive option for cash-strapped counties and cities—too tempting to resist.[7] Jane C. Needleman, *Exactions: Exploring*

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[7] *See* Br. of Amicus Curiae Inst. for Justice, *Koontz v. St. Johns River Mgmt. Dist.*, 11-1447(2012) (arguing that "[i]n the absence of judicial scrutiny, municipalities [commonly] use [] property exactions to finance pet projects... and observing that "[t]he prevalence of impact fees has steadily increased... [such that] they can [now] be found in hundreds of state and city codes across the country."); *see* State Impact Fee Enabling Acts, ImpactFees.com, http://impactfees.com/publications%

Exactly When Nollan and Dolan Should Be Triggered, 28 Cardozo L. Rev. 1563, 1572 (2006) ("Perhaps in recognition that municipalities are faced with increasingly dwindling funds, a number of courts have created bright-line distinctions in order to shelter various municipal decisions from a heightened scrutiny analysis."). For example, lawmakers in Pasco County, Florida have enacted an insidious law prohibiting the issuance of building permits for properties within the footprint of a planned highway, except on the condition that the owner dedicate the land within that highway corridor. *See Hillcrest Prop. LLP v. Pasco Cnty.*, 939 F. Supp. 2d 1240, 1242 (M.D. Fla. 2013) (chiding a County attorney for "proudly declar[ing], 'the [regime] … saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages.").[8] So long as this

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20pdf/state_enabling_acts.pdf (last visited Apr. 14 2017) (cataloging 29 different states that statutorily authorize local governments to impose impact fees).

[8] In 1987 the North Carolina General Assembly enacted a similar regime. The Roadway Corridor Official Map Act authorized the N.C. Department of Transportation to unilaterally impose effective encumbrances, prohibiting further development of properties within future highway corridors, upon recording of official plans. N.C.G.S. §§ 136–44.50 *849 to –44.54 (2015). The express goal was to minimize the State's obligation to pay just compensation in the future, if and when NC DOT should finally carry-out construction. *Kirby v. N. Carolina Dep't of Transportation*, 368 N.C. 847, 852 (2016). And while the N.C. Supreme Court recently held that this regime violated the State Constitution (in a case concerning hundreds of landowners), *Id.* at 926, the General Assembly might just as well enact a statute requiring these owners to convey easements for planned highway corridors as a condition of obtaining any future permit.

Court remains silent on the issue of legislative exactions, lawmakers will continue to expand these pernicious regimes so as to force a handful of citizens "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Cf.*, Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? - the Likely Impact of Koontz on the Local Government/developer Relationship*, 30 Touro L. Rev. 455, 476 (2014) (suggesting that local government should proactively seek "to circumvent the heightened standards of *Nollan*/*Dolan* by imposing impact fees and exactions through legislation…").

Admittedly, it remains unclear whether the North Carolina courts would embrace the supposed 'legislative exactions exception' in such a case. But in any event, *Amici* are concerned that other states will follow the lead of Pasco County, Florida and the North Carolina General Assembly in pioneering inventive ways to acquire land for planned highway corridors without paying just compensation. For example, it may only be a matter of time before California enacts legislation of this sort. The State Legislature might well have pursued this option as a means of reducing construction costs had Governor Jerry Brown failed to secure the super-majority required to raise taxes necessary to fund new highway projects. *See* Joel B. Pollak, Brown's 12-Cent Gas Tax Passes Legislature on Deadline, California Political Review (Apr. 9, 2017), *available* online at http://www.capoliticalreview.com/top-stories/browns-12-cent-gas-tax-passes-legislature-on-deadline/ (last visited Apr. 14, 2017).

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

What is more, Justice Ginsberg's opinion in *Arkansas Game & Fish Commission v. United States* lends further support to the conclusion that our takings jurisprudence rejects any rule that would allow for systematic circumvention of *Nollan* and *Dolan*. She explained that this Court generally rejects *per se* takings defenses. 133 S. Ct. 511, 518 (2012). This necessarily places the burden on government to offer a compelling doctrinal basis for a legislative exactions exception.

But neither the California Supreme Court nor any of her sister courts have been able to articulate a principled justification for a legislative exactions exception. The closest they have come to offering a rationale is in the assertion that legislative exactions are somehow different because they represent the culmination of the democratic process, which presumptively weighs competing public policy considerations. *See San Remo Hotel L.P. v. City and Cnty. of San Francisco*, 27 Cal. 4th 643, 671 (2002). Yet, our takings jurisprudence has never suggested that government actions inflicting constitutional injuries are any less pernicious when carried out at the hands of the legislature. *Lingle*, 544 U.S. at *id.* 529 (explaining that the takings test considers "the magnitude or character of the burden a particular regulation imposes upon private property rights or

how [the] regulatory burden is distributed among property owners.").

Quite to the contrary, regardless of whether an enactment is calculated to advance the interests of the general public, the Takings Clause prohibits enforcement of laws that so burden private property rights as to amount to a taking—except where just compensation is assured. This Court made that point clearly enough in *Mahon*. 260 U.S. at 415 (finding that a legislative enactment—geared toward protecting public health and safety—amounted to an unconstitutional taking because it went "too far" in restricting property rights). And in *Lucas v. South Carolina Coastal Council*, this Court squarely and unequivocally rejected the errant premise that the Takings Clause carries less force where generally applicable regulation is imposed upon similarly situated landowners. 505 U.S. 1003, 2900, n. 14 (1992) ("Justice STEVENS's approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause."). Likewise, in the context of our physical takings jurisprudence, this Court has unflinchingly held fast to the rule that a permanent physical occupation constitutes a *per se* taking—regardless of whether an appropriation is carried out by the *ad hoc* decisions of government agents, or by the dictates of enacted legislation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431-33 (1982); *see also Horne*, 135 S. Ct. at 2428 (holding that the U.S. Department of Agriculture violated *Loretto's per se* rule when requiring farmers to surrender personal property as a condition of lawfully engaging in the raisin market, under a generally applicable

regulatory order authorized by the Agricultural Marketing Agreement Act of 1937).

The only other apparent justification is that the wheels of government will somehow grind to a halt if communities are prohibited from imposing legislative exactions. *C.f.* Echeverria, *Supra* at 3 (arguing that stringent application of *Nollan* and *Dolan* may result in "negative practical effects on local government."). But Justice Ginsberg's opinion in *Arkansas Game & Fish* likewise repudiates arguments of this nature. 133 S. Ct. at 521 (noting that "[t]he sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability."); *Koontz*, 133 S. Ct. at 2600 (dismissing the dissents concerns as "exaggerate[d]"). For one, constitutional doctrine should not be shaped by the question of what is expedient for government because such an approach undermines the fundamental premise that the Constitution imposes objective limitations on what government may do to its citizens.[9] Moreover, it's hard to take seriously the argument that the sky will fall with enforcement of *Nollan* and *Dolan* because the nexus and rough proportionality tests merely require that the government must be able to demonstrate that a condition imposed on a permit is logically related to mitigating anticipated public impacts. *Koontz*, 133 S. Ct. at 2595 (emphasizing that *Nollan* and *Dolan* allow for "responsible land-use policy[,]" enabling authorities to impose conditions requiring

[9] *Cf. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1269 (2014) (rejecting expedient concerns that application of the Takings Clause would cost taxpayers hundreds of millions of dollars).

landowners to "internalize [] negative externalities[,]" while prohibiting government from using the permitting regime as a tool for extortion).

II. THE PRESENT CASE IS AN IDEAL VEHICLE FOR THIS COURT TO RESOLVE THIS RECURRENT QUESTION

While concurring in this Court's decision to deny *certiorari* in *California Home Builders Association v. City of San Jose*, Justice Thomas signaled that the time is approaching for the Court to resolve the lingering question of whether legislatively imposed exactions are subject to review under *Nollan* and *Dolan*. 136 S. Ct. 928 (Thomas, J., concurring). But as Thomas noted, the *San Jose* case was not the ideal vehicle to resolve that question both because the City had raised a cumbersome threshold question as to whether that petition was timely and because the petitioner had "disclaimed any reliance on *Nollan* and *Dolan* in the proceedings below." *Id*. Further, in that case, the California Supreme Court was somewhat unclear as to whether it was definitively resting its decision "on the distinction (if any) between takings effectuated through administrative versus legislative action." *Id.* But none of those complications are present in this case. On the contrary, this case is set up perfectly.

The record makes this an ideal case for the Court to resolve the legislative exactions question. Here there is no question that the California courts ruled that legislative exactions are subject to a more deferential standard than the nexus and rough

proportionality tests set forth in *Nollan*, *Dolan* and *Koontz*. *616 Croft Ave.*, 3 Cal. App. 5th at 625. Moreover, this is an especially appropriate case for this Court to consider the proper standard for accessing legislative exactions because the City unequivocally hung its hat on California's purported exception for legislatively imposed permitting conditions.

For that matter, the City Council previously praised Petitioners' project, acknowledging that it would provide a net gain for the City's stock residential housing, which "would help the City achieve its share of the regional housing need." Pet. at 4. And the City choose not to even attempt to demonstrate that the imposed condition satisfies *Nollan* and *Dolan's* nexus and rough proportionality tests. *See* Pet. at 7-8. (concluding that the City need not provide evidence establishing a reasonable relationship between housing fees and the impacts of the project). Instead, the City defends the contested exaction in this case solely on the view that legislatively imposed exactions are exempt from *Nollan* and *Dolan* review—and wholly acknowledging that the exaction was imposed for the purpose of forcing Petitioners to address social-economic issues that exist "independently" of their project. In affirming that a monetary exaction may be imposed to force developers to address societal problems that they did not create or contribute to, the California courts have thus deepened a well ripened conflict among the lower courts—a rift that has only grown more severe since *Koontz* was decided in 2013. *See Levin*, 71 F.Supp.3d at 1086 (Judge Charles R. Breyer concluding that

landowners cannot be forced to pay to address systemic problems that they did create).

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