No. _____

In the

Supreme Court of the United States

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

Petitioners,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A City of West Hollywood ordinance requires that builders of a proposed 11-unit condominium pay a $540,393.28 "affordable housing fee" to subsidize the construction of low-cost housing elsewhere in the City. The ordinance imposes the fee automatically as a condition on the approval of a building permit, without any requirement that the City show that the project creates a need for low-cost housing.

The question presented is:

Whether a legislatively mandated permit condition is 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).

LIST OF ALL PARTIES

616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer were the appellants in the California state appellate and supreme court proceedings below and are the petitioners herein.

City of West Hollywood, California, is the municipal respondent.

CORPORATE DISCLOSURE STATEMENT

Petitioners have 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

616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer respectfully request that this Court issue a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division One.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016), and is reproduced in Petitioners' Appendix (Pet. App.) at A. The California Supreme Court's order denying review appears at Pet. App. B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners 616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer filed a lawsuit challenging the City of West Hollywood's permit condition as violating the unconstitutional conditions doctrine predicated on the Fifth and Fourteenth Amendments to the United States Constitution. The California Court of Appeal dismissed their federal constitutional claim and upheld the City's exaction in the September 23, 2016, decision of the Second District, Division One, of the California Court of Appeal. The decision became final on December 21, 2016, when review was denied by the California Supreme Court. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS 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.

The relevant regulatory provisions are reproduced in the appendix to this petition. Pet. App. E.

STATEMENT OF THE CASE

In 1975, California's Legislature declared that the lack of affordable low- and moderate-income housing posed a very serious threat to the region's social and economic well-being. *See California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 441 (2015) (*CBIA*). The state's efforts to address the affordable housing problem over the years, however, have been largely unsuccessful. *Id.* Faced with a continuing shortage of affordable housing, many local governments turned to so-called "inclusionary zoning" ordinances, requiring that developers dedicate a certain percentage of the new homes they build as low-income housing, or pay a fee in-lieu of the dedication. *Id.* Since first proposed, the "inclusionary zoning" strategy has been highly

controversial because it relies on a permit condition as a tool to shift the burden of solving a pre-existing public problem onto an individual property owner as the "price" of obtaining an approval.[1]

While the "inclusionary zoning" strategy would appear to directly implicate the doctrine of unconstitutional conditions 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), a line of California cases has adopted a categorical rule that excludes legislatively imposed permit conditions from heightened scrutiny required by that doctrine. *See*, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868-69, 880-81 (1996) (limiting doctrine to adjudicative decisions); *San Remo Hotel L.P. v. City and Cty. of San Francisco*, 27 Cal. 4th 643, 671 (2002) (recognizing a California rule excluding legislative exactions from the doctrine); *see also CBIA*, 61 Cal. 4th at 461 n.11 (citing *Koontz*, 133 S. Ct. at 2599) (acknowledging the split of authority on the legislative exactions question but declining to address it).

This case arises from the City of West Hollywood's application of its "inclusionary zoning" ordinance to exact a half-million dollar affordable housing fee from a small developer, whose proposed infill project was determined to actually help—not exacerbate—the City's housing shortage.

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[1] *See*, *e.g.*, Note, *Constitutional Law–Fifth Amendment Takings Clause–California Court of Appeal Finds* Nollan*'s and* Dolan*'s Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance.* Home Builders Ass'n of Northern California v. City of Napa, 115 Harv. L. Rev. 2058 (2002).

A. The City of West Hollywood Imposed a Half-Million Dollar Affordable Housing Fee on the Lehrer-Graiwers' Demolition and Building Permits

Shelah and Jonathan Lehrer-Graiwer 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. Pet. App. A at 1-2. Acting through their company, 616 Croft Ave., LLC, in 2004, the Lehrer-Graiwers applied to the City for permits necessary to redevelop two adjacent single-family homes into a small condominium complex. *Id.* The City Council approved the project in a 2005 resolution, praising the project's "superior architectural design" and noting that the development will provide "11 families with a high quality living environment."[2] 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."[3]

Despite these findings, the City Council demanded that the owners pay a fee in-lieu of its affordable housing requirement as a condition of permit approval.[4] Pet. App. A at 3.

The City imposed the permit condition pursuant to its inclusionary zoning ordinance (reproduced in Pet.

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[2] Pet. App. D (City of West Hollywood Res. No. 05-3268, § 4(4)).

[3] *Id.* § 8(c).

[4] *Id.* § 11(Conditions 3.1 and 3.6); *see also* City of West Hollywood Dept. Of Community Dev. letters dated July 29, 2004 (AR 16-17) and September 24, 2004 (AR 26-27) asking whether the owners planned to satisfy the City's affordable housing exaction with on-site units or an in-lieu fee.

App. E), which requires developers to sell 20 percent of their newly constructed units at specified below-market rates or, in certain circumstances, 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. Pet. App. E at 2-4 (West Hollywood Municipal Code (WHMC) § 19.22.030-19.22.040). If the owner opts to dedicate housing units, he or she must first execute and record a deed restriction granting, among other conditions, a right of first refusal to any eligible households displaced by the development before the City issues the building permit.[5] Pet. App. E at 4-5 (WHMC § 19.22.080(C)). The owner must also grant the City—or any City-designated agency or organization—a purchase option for any inclusionary set-aside units that are not bought by displaced households. Pet. App. E at 8 (WHMC § 19.22.090(C)).

If the owner opts instead 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

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[5] The ordinance operates as follows: Upon completion of the "inclusionary units," the owner must first offer the homes at a price set by the City Council (currently between $66,413 and $178,804) to any low- or moderate-income households (incomes between $29,193 to $77,068) that were displaced by the project. Next, the owner must offer the units to any displaced households making up to 120 percent of the median income at the same owner-subsidized below-market prices. After that, the City (or a designated organization) may exercise its option to purchase the property at the below-market price. Otherwise, the units must be sold to general low- and moderate-income households at the same owner-subsidized below-market prices. *See* City of West Hollywood, Inclusionary Housing Program – Information for Developers at 6, *available at* http://www.weho.org/home/showdocument?id=25568.

of affordable housing. Pet. App. E at 3-4 (WHMC § 19.22.040(E)). Although the City Code provides that developers pay "an equitable share of the cost of mitigating" for impacts caused by the proposed development,[6] the Council in fact imposed a set fee based on a legislatively enacted "fee schedule" applicable to all new residential development, based solely on the floor area of the units to be constructed. *Id.* at 3 (WHMC § 19.22.040(B)); Pet. App. D (§ 11 (Condition 3.1)); *see also* AR 884 ("Exaction Fees"). The Council's uniform fee schedule permits no variation of the affordable housing fee based on project-specific circumstances.

Shortly after the Council approved the project subject to an affordable housing exaction, the housing market crashed. Pet. App. A at 3. At the Lehrer-Graiwers' requests, the City's Planning Commission extended its permit approvals several times between July 2008 and December 2011. *Id.* During that time, the Council drastically revised its fee schedule, nearly doubling its affordable housing fees. *Id.* Thus, when the Lehrer-Graiwers applied for the necessary permits in December 2011, the City conditioned issuance of the demolition and building permits upon the immediate payment of a $540,393.28 affordable housing in-lieu fee. *Id.*; *see also* AR 884 ("Exaction Fees").

B. The Lehrer-Graiwers Challenge the In-Lieu Fee as Violating *Nollan*, *Dolan*, and *Koontz*

The Lehrer-Graiwers objected and requested that the City Council review both the timing and amount of

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[6] *See* WHMC § 19.64.020.

its fee. City staff refused to reconsider the fees and refused to defer or extend the time for payment of the exaction fees. Pet. App. A at 3-4. Thus, on December 22, 2012, facing forfeiture or termination of their development approvals, the Lehrer-Graiwers paid the fees under protest. *Id*. The owners also requested that the City Council conduct an administrative review of the disputed exaction fees. *Id*.

When the Council 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*. Pet. App. A at 4-5; Appellants' 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 Council eventually agreed to hold an administrative hearing on the Lehrer-Graiwers' fee contest. During that proceeding, City staff asserted that, under a California rule that excludes legislatively mandated exactions from the heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz*, the City did not need to provide any evidence establishing a reasonable relationship between the housing fees and the impacts of the project.[7] Accordingly, the City provided no evidence of nexus and proportionality, admitting on the record that the in-lieu fee was not

[7] *See* City of West Hollywood's March 18, 2003, Staff Report on Fee Adjustment Hearing (AR 751-752).

"intended to mitigate impacts caused by development."[8] Instead, the City explained that the fee was designed to meet "needs for affordable housing that exist independently of the Applicants' residential development project[.]"[9]

After holding a hearing on the matter, the City Council adopted the City staff attorney's argument as justification for denying the Lehrer-Graiwers' fee challenge.[10] Despite a complete lack of any connection between the condominium proposal and the City's affordable housing needs, the City Council upheld the $540,393.28 exaction fee. Pet. App. A at 4.

The Lehrer-Graiwers returned to the trial court, which dismissed their unconstitutional conditions claim under a line of California cases holding legislatively imposed exactions categorically exempt from the heightened scrutiny required by *Nollan/Dolan/Koontz*.[11] Pet. App. C at 10. Thus, despite concluding that the ordinance required the owners give the City a well-recognized and constitutionally protected property interest (*i.e.*, a purchase option or a fee in-lieu) as a condition of

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[8] *Id.* (AR 752).

[9] *Id.* (AR 752).

[10] City of West Hollywood Resolution No. 13-4426, §§ 5-6 (AR 865-866).

[11] AR 326-338. Based on the trial court's decision, the Lehrer-Graiwers voluntarily dismissed their remaining claims in order to immediately appeal the court's judgment. AR 433. Final Judgment was entered on August 12, 2015. AR 440.

permit approval,[12] the trial court held that the affordable housing condition was subject only to California's "reasonable relationship" test. Pet. App. C 14-15.

That test, however, asked only whether "the fees were 'reasonably related' in purpose and amount to the City's need for affordable housing and to the cost of developing affordable units elsewhere in the City." Pet. App. C at 16-17. The court did not require the City to show that the Lehrer-Graiwers' development "caused a need for affordable housing to justify the in-lieu fee." Pet. App. C at 17-18. Even so, the trial court noted 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 had those constitutional tests been applied. *Id.* Nonetheless, the trial court upheld the $540,393.28 exaction upon the conclusion that the fee was "related to the cost of constructing affordable housing units within the City." *Id.* at 21.

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

The court of appeal upheld the trial court's decision under the same line of California Supreme Court cases holding that legislative exactions are categorically exempt from *Nollan/Dolan/Koontz*. Pet. App. A at 9-10 (citing *San Remo Hotel*, 27 Cal. 4th at 668-70, and *Ehrlich*, 12 Cal. 4th at 880-81). Thus, instead of applying the nexus and proportionality tests,

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[12] Pet. App. C at 14-15.

the court held that the Lehrer-Graiwers bore the burden of proving that the $540,393.28 in-lieu fee bore no reasonable relationship to the public's interest in affordable housing. Pet. App. A at 7, 9, 11, 13. And, like the trial court, the court of appeal had no problem concluding that a fee earmarked for funding the development of new housing elsewhere in the City would advance the public's interest in new affordable housing. Pet. App. A at 14-15.

Like the trial court, the court of appeal readily acknowledged that the in-lieu fee lacked both a nexus and a proportional relationship to the condominium project:

> [T]he in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing.

Pet. App. A at 9. But the court explained that, under California's rule, the validity of the affordable housing fee "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."[13] *Id.* (quoting *CBIA*, 61 Cal. 4th at 477). That is because the City's "affordable housing" fee is not intended to mitigate any adverse impacts of new development—instead, the fee is designed to "enhance the public welfare" by demanding that private property

[13] The court treated the Lehrer-Graiwers' claim as raising both a facial challenge to the City Council's adoption of the fee schedule (which the court dismissed as untimely) and an as-applied challenge to the fees actually imposed on the permit condition. Pet. App. A at 6-7 (facial), 7-15 (as-applied). This petition concerns the as-applied challenge.

owners put their land or money toward the development of affordable housing. *Id*. (quoting *CBIA*, 61 Cal. 4th at 454).

The Lehrer-Graiwers filed a petition for review with the California Supreme Court, which was denied (Pet. App. B), and now respectfully ask this Court to issue a writ of certiorari and provide much-needed direction on the important question of federal law decided below.

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 property to a public use. In the decision below, the California Court of Appeal adopted 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 an act of generally applicable legislation. Not only does the California decision depart from this Court's unconstitutional conditions doctrine precedents, it deepens a long-standing split of authority among the lower courts regarding the scrutiny applied to legislatively mandated exactions. The petition should be granted.

I

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

The California Court of Appeal's decision adopted a rule that categorically excludes well-recognized property rights from the protections guaranteed by the Fifth Amendment and the doctrine of unconstitutional conditions. Because of the per se nature of the California rule, the lower court refused to examine the permit condition to determine if the fee was imposed in lieu of a dedication of a property interest. Pet. App. A at 9-10. The court's refusal to do so directly conflicts with this Court's case law and leaves property owners without any protection against the type of extortion that the doctrine of unconstitutional conditions is supposed to curtail.

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 require a landowner to dedicate property to a public use *only* 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 property to the public 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.").

In *Nollan*, the California Coastal Commission, acting pursuant to the requirements of a state law, required the Nollans to dedicate an easement over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827-28. The Commission specifically justified the condition 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 development.

This Court agreed, holding that the easement condition was an unconstitutional taking because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused. *Id.* at 837. 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.*

In *Koontz*, this 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, this Court confirmed that an in-lieu fee is often the "functional equivalent" of an exaction of land. *Id.* at 2599.

Thus, 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."[14] *Id.* at 2600. If so, then the in-lieu

[14] In other words, the demand must seek an interest in private property, which is defined as the collection of rights inhering in an (continued...)

fee constitutes an exaction subject to the nexus and proportionality tests.

That requirement is met here. Indeed, in an unappealed conclusion of law, the trial court determined that West Hollywood's affordable housing ordinance conditions permit approval upon the transfer of well-recognized property rights to the City. Pet. App. C at 14-16 (the ordinance demands that developers "give[] it a 'right of first refusal' to purchase the affordable units which is, in effect, an option" and is a protected property right). 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) a fee in lieu (WHMC § 19.22.040).

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[14] (...continued)
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) ("property" is comprised of the rights to possess, use, exclude others, and dispose of the property); *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); *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).

California property law recognizes that owners have a right to sell their property to whom they choose, at a price they choose—which includes a right of first refusal. *See Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013) (a purchase option is a protected property right); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (1983) (A right of first refusal is a property right);[15] *see also 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."); *Laguna Royale Owners Ass'n. v. Darger*, 174 Cal. Rptr. 136, 144 (1981) (recognizing an owner's right to use and dispose of property as he chooses); *Ex parte Quarg*, 149 Cal. 79, 80 (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 decision below, however, explained that under the California rule, it is unnecessary for a court to consider whether the government's underlying demand

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[15] 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).

seeks the dedication of a property interest because all legislative exactions are categorically exempt from heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 10. As a result, the state court failed to protect well-recognized rights from being indirectly appropriated in a permit condition, raising an important question of federal takings law that warrants review.

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

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 Resources 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).

Koontz, which also involved a fee imposed in lieu of a dedication of private property to the public, is directly on point. *Id.* at 2592-93. The permitting authority in that case determined the amount of the fee pursuant to a generally applicable regulation setting the minimum mitigation ratio.[16] *Id.* Florida's Department of Environmental Protection adopted the regulation nearly a decade before Koontz submitted his permit application. *Id.* The fact that the fee was legislatively required did not deter this Court from

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[16] *See also* Respondent's Brief in Opposition, *Koontz*, 2012 WL 3142655, at *5 n.4 (U.S. Aug. 2012) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

concluding that it was subject to the nexus and proportionality tests (*Koontz*, 133 S. Ct. at 2599-2600)—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

Koontz holds that when the government imposes an in-lieu fee on a permit approval, the reviewing court must look at the underlying condition to determine whether it implicates the doctrine of unconstitutional conditions. *See Koontz*, 133 S. Ct. at 2599 (An in-lieu fee is the "functional[] equivalent" of the demand for a dedication of property.). Thus, as a predicate to an as-applied challenge, a court must first determine whether any of the alternative demands (in this case, the dedication of low-income units and a right of first refusal) would violate the Constitution. *Koontz*, 133 S. Ct. at 2598. By adopting a per se rule that excludes all legislatively mandated exactions from inquiry, the court of appeal eliminated this necessary determination, leaving constitutionally guaranteed rights without meaningful protection.

Furthermore, there is no basis in the unconstitutional conditions doctrine for drawing any distinction between legislative and adjudicative exactions. Indeed, since the doctrine's origin in the mid-nineteenth century, this Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals.[17]

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[17] *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 (continued...)

The purpose of the doctrine—to enforce a constitutional limit on government authority—explains why it applies without regard to the type of government entity making the unconstitutional demand:

> [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.

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[17] (...continued)
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 or 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 remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 406 (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).

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).[18]

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, where a single government body writes the law, issues permits, and sits in review of its decision as the City did here, it is often difficult to distinguish one branch of the government 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).

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[18] *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.").

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.

Two Justices of this Court have 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 percent 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 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.

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). There, he wrote that the "lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one" for at least two decades. *Id.* Once again, he expressed "doubt that 'the existence of a taking should turn on the type of

governmental entity responsible for the taking.'" *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18). Justice Thomas further noted that the Court should resolve this issue as soon as possible:

> Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Id.; *see also Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (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.").

California's adoption of a categorical rule exempting all legislatively mandated exactions from the heightened scrutiny required by *Nollan/Dolan/Koontz* implicates all of the legal and policy concerns identified by members of this Court and warrants review.

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 decision below holds that a challenge to a legislatively imposed condition on a development permit is subject only to a test that asks whether the

condition reasonably relates to the public's general welfare. Pet. App. A at 9-10, 11-15. That standard 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. 528, 542 (2005). "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* determined 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, *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.[19] Therefore, because the monetary exaction in this case would also constitute a per se taking if imposed directly (*Koontz*, 133 S. Ct. at 2600), the fact that the legislature authorized the imposed conditions is irrelevant to the analysis.

Moreover, California's "reasonably related" standard directly implicates the fundamental understanding that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). As demonstrated by the decisions below, the "reasonably related" test is predicated on the conclusion that the

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[19] *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).

public, by operation of the City's ordinance, had a proprietary interest in the number of affordable housing units it demands from new development. Pet. App. C at 19-21 (concluding that the Lehrer-Graiwers' decision to pay a fee in-lieu "deprived the City of the affordable housing units that would otherwise be required"). Thus, the lower courts upheld the half-million dollar fee simply because it represented the replacement cost of the inclusionary units that the City's ordinance demanded. Only the heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz* will guard against this type of end-run.

C. California's Legislative Exactions Rule Undermines the Takings Clause by Removing Any Limitation on the Amount of Property That Can be Demanded in a Permit Condition

The California courts justify the adoption of a categorical rule by likening legislative exactions to the type of generally applicable land-use regulations that are subject to the normal democratic process, which typically operates as a check on legislative authority. *CBIA*, 61 Cal. 4th at 471 ("While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.") (quoting *San Remo Hotel*, 27 Cal. 4th at 671). That justification fails because the Takings Clause is founded on the anti-majoritarian principle that "public burdens . . . should be borne by the public as a whole" and cannot be shifted onto individual property owners. *Armstrong*, 364 U.S. at 49.

When the government places public costs on a small number of people, the democratic process, which is majoritarian in nature, works as an endorsement, not a check. *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 that circumstance, "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 how West Hollywood's inclusionary zoning ordinance works. The affordable housing exaction does not "defray the cost of increased demand on public services resulting from [any individual developer's] specific development project, but rather . . . combat[s] the overall lack of affordable housing." Pet. App. A at 9. That is a textbook "public burden" which constitutionally must be shouldered by the public at large. But California's legislative exactions rule allows local government to adopt a law shifting that burden onto individual property owners in the form of a permit condition. Thus, the City demanded a half-million dollar fee—earmarked for the City's general housing subsidy program—from an owner whose proposed condominium would help *ameliorate* the City's housing shortage, without public outcry.

When the government is not required to demonstrate a connection between an exaction and the project impacts, and where there is no meaningful democratic check on its actions, there is no limit to the amount of money or property that the government can demand as a permit condition, and there is no end to the types of social problems that individual property owners will not be called upon to solve. The California court's decision, therefore, operates as an exception that swallows the rules and policy this Court set out in *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); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (division has been deepening for over twenty years). 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

(Me. 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.), *cert. denied*, 514 U.S. 1109 (1994); *Trimen Development Co. v. King Cty.*, 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 Cty. 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*, 27 Cal. 4th at 643; *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.), *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 with the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cty. 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*), *appeal pending*.

This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's review. 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 West Hollywood'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.

CONCLUSION

The petition for writ of certiorari should be granted.

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