No. 16-1137

In the
Supreme Court of the United States

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

v.

CITY OF WEST HOLLYWOOD, CALIFORNIA
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Court Rule 37.2(b), Citizens' Alliance for Property Rights Legal Fund (CAPR Legal Fund) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners 616 Croft Ave., LLC, and Jonathan and Shelah Lehrer-Graiwer. CAPR Legal Fund timely sent letters indicating its intent to file an amicus brief to all counsel of record pursuant to Rule 37.29(a). Petitioners granted consent for amicus participation by way of a global-consent letter filed with the Court. Respondent City of West Hollywood, California, withheld consent as reflected in correspondence filed herewith.

CAPR Legal Fund is a 501(c)(3) nonprofit corporation organized in the State of Washington. Together with its umbrella organization, Citizens' Alliance for Property Rights, CAPR Legal Fund litigates against government regulations and actions that threaten the rights of property owners. *See, e.g.*, *Citizens' Alliance for Property Rights v. City of Duvall*, 636 Fed. App'x 430 (2016); *Citizens' Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wash. 2d 428 (2015); *Citizens' Alliance for Property Rights v. Sims*, 145 Wash. App. 649 (2008). It is part of the membership umbrella organization, Citizens' Alliance for Property Rights, which at present represents 435 dues-paying members in Washington and California from all walks of life who are united in the goal of protecting the fundamental right to use, enjoy, and develop private property.

CAPR Legal Fund represents the voices of 435 members—and the interests of countless more nonmember landowners—in jurisdictions with some of the most burdensome land-use regulations. As the representative of those members and nonmembers, and in light of its experiences combating such regulations, CAPR Legal believes it can provide an additional and useful viewpoint in this case.

For all the foregoing reasons, the Court should grant CAPR Legal Fund leave to file the attached amicus brief.

DATED: April 20, 2017

Respectfully submitted,

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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).

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

Amicus curiae Citizens' Alliance for Property Rights Legal Fund (CAPR Legal Fund) is a 501(c)(3) nonprofit organization, which litigates on behalf of landowners in defense of their property rights. In addition to litigating for property rights, the Legal Fund engages in significant public-education efforts and outreach in furtherance of property rights, and works to connect knowledgeable volunteers and those needing help navigating the often-complex land-use regulatory system.

The Legal Fund is affiliated with the umbrella organization, Citizens' Alliance for Property Rights, which was organized in 2003, in the State of Washington, as a nonprofit, membership organization. It was established to advocate for and support equitable and scientifically sound land-use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all.

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[1] Pursuant to Rule 37.6, CAPR Legal Fund certifies that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from CAPR Legal Fund, made any monetary contribution toward the brief's preparation and submission.

CAPR Legal Fund timely sent letters indicating its intent to file an amicus brief to all counsel of record, pursuant to Rule 37.2(a). Petitioners granted consent for amicus participation, by way of a global-consent letter filed with the Court. Respondent City of West Hollywood, California, withheld consent.

CAPR membership is open to anyone with an interest in advancing the cause of property rights, and counts among its ranks a wide array of individuals—from renters, to small residential homeowners, to large ranchers. Representing 435 dues-paying members, the organization has chapters in the States of Washington and California. Given its history and experience with property rights, CAPR Legal Fund believes it can offer a unique and important perspective on the issues that the pending petition raises.

INTRODUCTION AND SUMMARY OF THE ARGUMENT FOR GRANTING THE PETITION

The petition presents a federal constitutional question of enormous consequence to everyday property owners, and about which courts across the country have been divided for years: Can the government shield an otherwise unconstitutional permit exaction simply because the exaction is enshrined in a legislative act, like a statute or ordinance? On the naive premise that state legislatures, county boards of supervisors and city councils are more protective of property owners than planning or building officials who impose permit exactions on an *ad hoc* basis, California courts have answered the question in the affirmative. California stands against both the doctrinal roots of the unconstitutional conditions doctrine, this Court's precedents in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and a number of jurisdictions—none of which recognize a relevant

constitutional distinction between legislative and *ad hoc* exactions.

This case comes to the Court with a clean legal question on undisputed material facts, and no procedural issues that would preclude review on that basis.[2] As such, the case presents the Court with an unparalleled opportunity to finally put to rest perhaps the most contentious takings question currently facing property owners, government agencies, the bar, and the courts. This brief focuses on just two aspects of this case to underscore its "cert"-worthiness.

First, unlike prior cases presenting the "legislative versus *ad hoc* exactions" question to the Court, this case involves an ordinance that unequivocally imposes burdens on the *protected property interests* of the petitioning property owner. Under the ordinance, the Petitioners had to either (1) convey by deed restriction a right of first refusal to displaced tenants, the City, or a City-designated organization, allowing those third parties to purchase price-controlled units, or (2) pay an in-lieu fee into an "affordable housing" fund. Both kinds of exactions burden protectable property interests.

Second, the case squarely and clearly presents the "legislative versus *ad hoc* exaction" issue. The ordinance imposed a legislative exaction on Petitioners, including through a legislatively adopted

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[2] *Cf. California Building Industry Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016) (Thomas, J., concurring in the denial of certiorari) (discussing issues with the case's procedural posture that precluded the Court's review of a similar "legislative versus *ad hoc* exaction" issue).

fee schedule. The ordinance afforded no city body or official the discretion to deviate from the ordinance's exactions. Those clear-cut facts make this case an excellent vehicle to finally decide whether the *legislative* nature of the exaction makes any constitutional difference.

For those reasons, and the reasons stated in Petitioners' petition for writ of certiorari, the Court should grant the petition.

ARGUMENT

I.

THE ORDINANCE UNEQUIVOCALLY CONDITIONED PETITIONERS' PERMIT ON THE CONVEYANCE OF A PROTECTED PROPERTY INTEREST

It is indisputable that the City of West Hollywood's "inclusionary housing" ordinance conditioned Petitioners' permit on their dedication of protected property interests without payment of just compensation. Petitioners' Appendix (Pet. App.) E. Under the ordinance, Petitioners could choose their poison. They could ***either***:

> (1) Execute and record a deed restriction granting a right of first refusal to purchase price-controlled units to eligible households displaced by the project ***and*** a purchase option to the City, or City-designated agency or organization, for any such units not bought by displaced households; ***or***

(2) Pay an in-lieu fee to the City, to be deposited in an "affordable housing trust fund" used to subsidize the provision of affordable housing within its jurisdiction.

Pet. App. E at 3-5, 8.

This Court has held that money that a land-use applicant is forced to pay as the condition of obtaining a permit is "property" under the Takings Clause of the Fifth Amendment to the United States Constitution. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2599 (2013) (rejecting the view that "an obligation to spend money can never provide the basis for a takings claim"). As a consequence, an exaction of money, like the in-lieu fee that Petitioners ultimately "chose" to pay under protest, is subject to heightened scrutiny under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Koontz*, 133 S. Ct. at 2599 ("[W]e . . . hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.); *id.* at 2603 (Kagan, J., dissenting) ("The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money.").

But even the alternative that the Petitioners faced—conveyance of a right of first refusal by deed restriction—burdened a protected property interest under the Takings Clause. Under California law, "[t]he ability to sell and transfer property is a fundamental aspect of property ownership," which

"consists mainly of three powers: possession, use, and disposition." *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 88 (1983), *disapproved on other grounds*, *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 686 n.43 (1984). And "California courts have long recognized the fundamental importance of an owner's right, absent an illegal purpose, to sell property to whomever the owner chooses." *Id.* Accordingly, a government requirement that an owner convey a right of first refusal to a particular person or entity "simply appropriates an owner's right to sell his property to persons of his choice," along with his "legally recognized right to sell a right of first refusal or preemptive right" in the subject property to whomever he chooses. *Id.* at 89. After all, "[i]t is well established that a preemptive right"—i.e., a right of first refusal or purchase option—"is a valuable property right which may be bought, sold, and enforced in a court of law." *Id.*; *see also Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013) ("[A] purchase option is a sufficiently strong interest in the property to require compensation if the government takes it in eminent domain.").

So engrained nationally is the principle that a right of first refusal is a protected property right, that a majority of jurisdictions recognize it as such. The State of Washington is an example. In *Manufactured Housing Comtys. of Wash. v. Washington*, 142 Wash. 2d 347 (2000), the Washington Supreme Court *en banc* reviewed the constitutionality of a statute requiring owners of mobile home parks to convey the right of first refusal to their tenants. The Supreme Court held that "a right of first refusal in the hands of the Park Owners is a fundamental attribute of

ownership and a valuable property right, and that the forced transfer of this right under chapter 59.23 RCW constitutes a taking." *Id.* at 370; *see also Gore v. Beren*, 254 Kan. 418, 429 (Kan. 1994) ("Agreements creating an option or a preemptive right to purchase real estate constitute property interests . . . ."); *Ferrero Construction Co. v. Dennis Rourke Corp.*, 311 Md. 560, 565 (Md. Ct. App. 1988) ("The vast majority of courts and commentators have held that rights of first refusal, which are more commonly known as 'preemptive rights,' are interests in property and not merely contract rights."); *but see Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc.*, 986 So. 2d 1279, 1286 (Fla. 2008) (holding that a right of first refusal is not a property right, but recognizing that "courts adopting the majority view generally conclude that an option or right of first refusal creates an interest in property").

The unequivocal way in which the ordinance in this case burdens property rights distinguishes it from another California exaction case in which the Court denied certiorari and on which the lower court in this case mystifyingly relied: *California Building Indus. Ass'n v. City of San Jose ("CBIA")*, 61 Cal. 4th 435 (2015). There, the California Supreme Court held that the "affordable housing" ordinance "does not impose 'exactions' upon the developers' property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution." *Id.* 443-44. Specifically, the Supreme Court concluded that "the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause

outside of the permit process." *Id.* at 461. It went on to explain that "the principal requirement that the challenged ordinance imposes upon a developer is that the developer sell 15 percent of its on-site for-sale units at an affordable housing price," which "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public," but instead "simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale." *Id.*

Moreover, while the San Jose ordinance imposes on *future* purchasers certain restrictions on the alienation of their units, those restrictions do not apply to, and therefore take no property interest from, the *developer. Id.* at 467. It is not as if "the San Jose ordinance . . . require[s] that the developer grant the city an option to purchase each affordable unit when the unit is up for sale or resale"—which the California Supreme Court suggested could effect a taking of a property right. *Id.*

Of course, the forced conveyance of "an option to purchase" to third parties is precisely what the City of West Hollywood's ordinance demanded of the Petitioners (as one of two alternatives, the other being the in-lieu fee). It is what distinguishes this case from *CBIA*, which this Court declined to review. And, in terms of "cert"-worthiness, the Court would be hard pressed to find a better vehicle than this case for resolving the "legislative versus *ad hoc* exaction" issue.

II.

COURTS HAVE LONG BEEN SPLIT ON THE QUESTION OF WHETHER LEGISLATIVELY IMPOSED EXACTIONS ARE SUBJECT TO HEIGHTENED CONSTITUTIONAL SCRUTINY

Courts across the country are split over the question of whether legislatively imposed permit conditions are subject to *Nollan* review. For example, the Texas and Ohio Supreme Courts have declined to distinguish between legislative and *ad hoc* exactions, and have applied *Nollan*-level scrutiny to generally applicable permit conditions. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 643 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000). On the other hand, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, and the Tenth Circuit have chosen to limit *Nollan* and *Dolan* to administratively imposed or *ad hoc* exactions. *See, e.g.*, *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997) (*Dolan* does not apply to legislatively imposed conditions); *Mead v. City of Cotati*, 389 Fed. App'x 637, 638-39 (9th Cir. 2010) (same). The conflict among the courts raises an important question concerning the scope of the constitutional right to be free from uncompensated takings of private property, particularly when the cases refusing to apply *Nollan* may be in conflict with *Nollan* and *Dolan* themselves.

As this Court's decisions show, there is no doctrinal justification for the "legislative versus *ad hoc* exaction" distinction; 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 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context). The *Nollan* Court applied heightened scrutiny to and invalidated the California Coastal Commission's easement condition, which was the result of the agency's ***quasi-legislative policy*** that already had been applied to over 40 similarly situated property owners. *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, "stringent regulation of development along the California coast has been in place at least since 1976" and, in particular, 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."). Similarly, in *Dolan*, the government acted under ***a generally applicable and legislatively enacted ordinance*** designed to address transportation congestion when it conditioned a property owner's building permit on her dedication of a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code].").

There is no reason "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). But such deference is unjustified. As Justice Thomas explained in his dissent to the denial of certiorari in *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995):

> It is not clear why the existence of a taking should turn on the type of governmental 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 . . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Twenty-one years later, the same concerns plagued Justice Thomas when he concurred in the denial of certiorari (for procedural reasons) in *CBIA*:

> I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking. 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.

CBIA, 136 S Ct. at 928-29 (internal citation and quotation marks omitted).

Clearly, from the property owner's perspective, whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit results in the exact same injury. The irrelevance of the "legislative versus *ad hoc* exaction" distinction comes as no surprise, in light of *Nollan*'s roots in the unconstitutional conditions doctrine. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005). The doctrine "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.

Finally, allowing a purely "formalistic exception" to the unconstitutional conditions doctrine for *legislative* exactions to persist simply "would allow permitting authorities to evade heightened scrutiny when the constitutional injury would be the same with or without the exception." Luke A. Wake & Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River*

Management District, 27 Geo. Int'l Envtl. Rev. 539, 569 (2015). Indeed, this Court's relatively recent decision in *Koontz* suggests that "courts should reject any rule that would allow government to immunize itself from the strictures of the nexus and rough proportionality tests." *Id.* (citing *Koontz*, 133 S. Ct. at 2595 (rejecting the notion that a constitutional difference exists between conditions precedent and conditions subsequent to permit approval on the ground that "[a] contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.")).

The California Court of Appeal's opinion in this case, which holds that *Nollan, Dolan*, and *Koontz* are inapplicable to legislative exactions, adds confusion to takings jurisprudence and exposes property owners, big and small, to the very threat that those important decisions sought to address. The Court should grant the petition in this case to resolve the longstanding conflict among the courts and restore—to ***all*** Americans—the full purpose and promise of *Nollan*, *Dolan*, and *Koontz* as bulwarks against uncompensated takings in the land-use permit context.

CONCLUSION

For the reasons stated above, and those stated in the petition, the Court should grant the petition.

DATED: April 2017

Respectfully submitted,

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