No. 16-1137

IN THE

Supreme Court of the United States

616 CROFT AVE., LLC, *et al.*,

Petitioners,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

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

MOTION OF *AMICI CURIAE* CATO INSTITUTE, REASON FOUNDATION, AND NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE AND BRIEF IN SUPPORT OF PETITIONERS

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The Cato Institute, Reason Foundation, and National Association of Home Builders ("NAHB") hereby move, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for writ of certiorari to the California Court of Appeal. *Amici* are filing this motion because the Respondent, City of West Hollywood, declined to consent to *amici*'s filing of their brief. Petitioners have consented. A copy of the proposed brief is attached.

As more fully explained in the proposed brief's "Interest of *Amici Curiae*" section, *amici* are organizations that frequently participate in cases raising significant constitutional issues, including cases involving property rights. *Amici* have a vital interest in this case because it affords the Court the opportunity to clarify that the "nexus" and "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislatively imposed permit conditions. If the decision below stands, then states and localities will continue to use such conditions to circumvent Takings Clause requirements in precisely the manner this Court sought to stop in *Dolan, Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

Accordingly, the Cato Institute, Reason Foundation, and NAHB respectfully request that the Court grant leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs on a host of legal issues, including property rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

industry. Chief among NAHB's goals is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes in the United States. NAHB is a vigilant advocate in the nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members.

This petition is important to *amici* because it affords the Court the opportunity to clarify that the "nexus" and "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislatively imposed permit conditions. If the decision below stands, then states and localities will continue to use such conditions to circumvent Takings Clause requirements in precisely the manner the Court sought to stop in *Dolan*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

SUMMARY OF THE ARGUMENT

The Court has repeatedly recognized that governments can misuse land-use permits to avoid their obligations under the Takings Clause. In response, the Court has limited governments from conditioning a land-use permit on the landowner surrendering a property right. Applying the unconstitutional conditions doctrine in this setting, the Court has explained that "the government may not require a person to give up a constitutional right—here

the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In other words, government cannot accomplish indirectly through land-use permits what it cannot do directly by taking the property.

The test for determining whether a condition violates the unconstitutional conditions doctrine is straightfoward. The reviewing court must first determine whether the condition itself would be a taking if imposed outside the permitting context. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). If so, the court must then ask whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 2591. This test was formulated to ensure that governments do not circumvent the Takings Clause by extracting property interests at will, while also protecting their power to mitigate any harm a proposed development may cause.

As this case demonstrates, however, municipalities and counties have devised schemes to evade the prohibition on uncompensated takings. Here, the City of West Hollywood implemented a zoning ordinance that requires developers who build multi-unit housing either (1) to sell or rent a percentage of that housing at below-market prices or (2) to pay an "in lieu" fee that West Hollywood calculates using a formula created by statute. West Hollywood Municipal Code ("WHMC") §§ 19.22.020-040; Pet. App. 2a, 2c. Developers must also grant West Hollywood a purchase option for the below-market units. WHMC

§ 19.22.090(C); Pet. App. 10a, 15c-16c. Petitioners sought a permit to build an 11-unit development and elected to pay the in-lieu fee under protest, later challenging it as an unconstituitonal taking. Applying state-court precedent, the trial court accepted West Hollywood's argument that this Court's decisions in *Dolan* and *Nollan* are "inapplicable because the in-lieu fees were assessed pursuant to a generally applicable ordinance rather than an 'ad hoc' discretionary permitting decision." Pet. App. 11c; *see also* Pet. App. 13c ("[T]he *Nollan/Dolan* line of cases [are] inapplicable because the fee was imposed on all residential [units] within the city, not just the plaintiff's [units]."). The California Court of Appeal affirmed, holding that this Court's precedent was inapplicable because the conditions were the product of legislative, rather than executive action. Pet. App. 8a-9a (noting that the "set-aside requirement is not governed by *Nollan* or *Dolan*"). Thus, although there is no dispute that "the purpose of the in-lieu housing fee here is not to defray the costs of increased demand on public services resulting from [Petitioners'] specific development project," the court below upheld its constitutionality. Pet. App. 9a.

There is no basis in this Court's jurisprudence—or in logic—for exempting legislatively imposed conditions in this manner. This Court has never distinguished between legislative conditions and *ad hoc* conditions; it has instead invalidated both under the unconstitutional conditions doctrine. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972). It would make little sense to treat the two types of conditions differently, as "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Ga., Inc. v.*

City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118.

A common response is that *ad hoc* conditions are more prone to abuse than their legislative counterparts because they are typically insulated from democratic processes. *See, e.g.*, *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 671 (2002). But this view is myopic. Legislators are just as prone as bureaucrats to impose uncompensated conditions. They can score political points by targeting groups (such as developers) in legislation that a majority of their constituents support. And while *ad hoc* permitting conditions apply only to a single landowner, legislated conditions apply to broad categories of landowners. For that reason, legislatively imposed conditions pose an even greater threat to individual property rights than *ad hoc* ones. Put simply, the need for rigorous application of the unconstitutional conditions doctrine to legislative conditions is *more* acute than with *ad hoc* permitting conditions.

Finally, there is an acknowledged split of authority on this issue. *See, e.g.*, *Parking Ass'n of Ga.*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of cert.); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.). That split has deepened over the last two decades, with the majority of courts incorrectly exempting legislative conditions from the unconstitutional conditions doctrine. Without this Court's intervention, lower courts are likely to continue trending in the wrong direction, allowing more states and localities to circumvent their constitutional obligations under the Takings Clause.

For these reasons, *amici* respectfully request that the Court grant the petition.

ARGUMENT

I. Governments Evade Their "Just Compensation" Obligations When Courts Exempt Legislatively Imposed Conditions from the Unconstitutional Conditions Doctrine.

A. The Decision Below Undermines the Court's Protection of Property Rights in *Nollan*, *Dolan*, and *Koontz*.

The Fifth Amendment's Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power'" to pay "just compensation" for the taken property interests. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted).

This Court has long recognized that states often try to circumvent the "just compensation" requirement through the land-use permitting process. In *Nollan*, for example, the California Coastal Commission conditioned a building permit on the landowners granting a public easement across their property to access a beach. *See* 483 U.S. at 827. The Court explained that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis ... , rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831.

The Court explained that conditioning a permit upon the grant of that same easement, which had no relationship to the permit request itself, is "an out-and-out plan of extortion." *Id.* at 837 (citation omitted). Compliance with the Takings Clause, the Court emphasized, is "more than an exercise in cleverness and imagination." *Id.* at 841. To ensure compliance with the "just compensation" requirement, the Court thus extended the doctrine of "unconstitutional conditions" to attempts by states and localities to impose onerous conditions in the permitting process. *Dolan*, 512 U.S. at 385.

There are important reasons why this Court chose to restrict states' and local governments' permitting power in this manner. In particular, "land-use permit applicants 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 more than property it would like to take." *Koontz*, 133 S. Ct. at 2594. The government can therefore force a landowner to sacrifice property in exchange for a valuable land-use permit. *Id.* "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation." *Id.* at 2595.

To prevent this "gimmickry," courts should apply heightened scrutiny to conditions placed in land-use permits. *Dolan*, 512 U.S. at 387. When reviewing a permit, courts must first decide whether the proposed condition would be a taking if the government imposed it directly on the landowner outside the permitting process. *Koontz*, 133 S. Ct. at 2598 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to

do what it attempted to pressure that person into doing."); *see also Lingle*, 544 U.S. at 537-40 (explaining the test for finding a taking). If the condition would be a taking, then the state cannot impose it as a condition *unless* there is a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the [landowner's] proposal." *Koontz*, 133 S. Ct. at 2595.

This test protects both the landowner's property rights and the government's regulatory interests. It balances (1) the reality that state and local governments often try to coerce landowners into giving up property interests and (2) the possibility that "proposed land uses threaten to impose costs on the public that dedications of property can offset." *Id.* at 2594-95. The Court's "precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out ... extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 2595 (quoting *Dolan*, 512 U.S. at 387). For example, if a landowner's "proposed development … somehow encroache[s] on existing greenway space in the city," then it would be permissible "to require the [landowner] to provide some alternative greenway space for the public either on her property or elsewhere" as a condition of obtaining the permit. *Dolan*, 512 U.S. at 394.

The Court's guidance has not deterred states and localities from still trying to avoid their compensation obligations. Just as states and localities attempted to use land-use permits to avoid those obligations altogether, they increasingly accomplish that same end by gaming the Court's "nexus" and "rough proportionality" test.

Koontz is the perfect example of this "gimmickry." There, a Florida water management district conditioned the landowner's requested permit on the landowner paying for improvements on unrelated government-owned property. 133 S. Ct. at 2593. The government argued that the landowner's claim failed at the first step because "the exaction at issue here was money rather than a more tangible interest in real property." *Id.* at 2599. But the Court recognized that "if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* "[A] permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* By rejecting the government's argument, the Court prevented an end-run of the "just compensation" requirement.

West Hollywood's ordinance is the next attempt to dodge "nexus" and "rough proportionality" scrutiny. Now that in-lieu fees are subject to that scrutiny, states and localities like West Hollywood need only embed those fees in an ordinance to exempt them, thus returning to the status quo before *Koontz*. Importantly, it is undisputed in this case that "the purpose of the in-lieu housing fee here *is not* to defray the costs of increased demand on public services resulting from [Petitioners'] specific development project." Pet. App. 9a (emphasis added). If *Koontz* applies to the ordinance, then the in-lieu fee is unconstitutional. West Hollywood avoids that problem by relying on the Supreme Court of California's distorted reading of *Nollan* and *Dolan.* This Court should grant certiorari to block West Hollywood's unabashed attempt to evade the Takings Clause.

B. There Is No Doctrinal or Reasoned Basis for Exempting Legislative Conditions from Heightened Scrutiny.

"One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A common justification for distinguishing between legislatively imposed conditions and *ad hoc* permitting conditions is that the latter are more likely to be abused. Pet. App. 14c. "*Ad hoc* [conditions] deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape ... political controls." *San Remo*, 27 Cal. 4th at 671. According to some courts, "[t]he risk of [extortionate] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision." *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *see also San Remo*, 27 Cal. 4th at 668 (explaining that "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present" for legislative conditions).

This reasoning is flawed. The notion that *ad hoc* conditions are more prone to abuse is overly simplistic. Indeed, the risk of abuse is *greater* for legislatively imposed conditions. The Supreme Court of Texas has recognized that legislatures can "'gang up' on particular groups to force exactions 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). Legislatively or ordinance-based land-use decisions "reflect classic majoritarian oppression." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 271 (2000). As West Hollywood's ordinance demonstrates, "developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored." *Id.* That is because "the single issue that characterizes the legislative process of many suburban communities in the United States is the antidevelopment issue." *Id.* As a result, "discrimination against a prodevelopment minority is quite likely given that they are so outnumbered." *Id.*

The sweeping application of legislative conditions amplifies the potential for abuse. The ordinance here, for example, applies to all new multi-unit residential developments in West Hollywood. *See* WHMC § 19.22.030. So instead of a single administrative body extracting unconstitutional concessions from developers one by one, West Hollywood has accomplished that feat in one fell swoop. Other municipalities—in California and other states where courts immunize legislative conditions—are currently free to impose similar exactions in broadly applicable legislative enactments.

Perhaps this result would be acceptable if there were some other doctrinal basis for exempting legislatively imposed conditions. But there is none: treating these conditions differently is an act of hollow formalism rather than a logical conclusion. As two justices of this Court recognized more than 20 years ago, "[i]t is not clear why the existence of a taking should turn on the type of

governmental entity responsible for the taking." *Parking Ass'n of Ga.*, 515 U.S. at 1117-18 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118. Focusing on the governmental entity in this manner leads to absurd results. Under the Court of Appeal's decision, a municipality's decision is subject to heightened scrutiny if it conditions *one homeowner's* permit on surrendering a property right. But the same municipality can freely "*seize[] several hundred homes*" if that condition originates from legislation. *Id.* (emphasis added). There is simply no logical basis for this result, which is why "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.*

Those courts that have exempted these conditions may be driven by the mistaken belief that the unconstitutional conditions doctrine cannot be applied to a legislatively mandated in-lieu fee because such a challenge is akin to a facial challenge. Because the "nexus" and "rough proportionality" test requires an examination of how the permit's condition fits with a *particular* piece of property, the argument goes, courts cannot make that determination on a facial basis.

But the same is true for other unconstitutional conditions imposed by statute. Like the "nexus" and "rough proportionality" test, all unconstitutional conditions cases require some form of weighing the importance of the governmental interest against the nature of the condition. *See, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 558-64 (1983). Despite that requirement, this Court

has repeatedly sustained facial challenges to legislative acts imposing unconstitutional conditions. For example, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated a statute that conditioned the receipt of state-sponsored healthcare on living in that state for a year, *id.* at 251, 269-70; *see also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (applying unconstitutional conditions doctrine to a federal statute without regard to its legislative origin); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (same). Lower courts have shown that the same can be true in the property context. *See, e.g.*, *N. Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995) (invalidating a legislatively imposed condition under *Nollan* and *Dolan*). Of note, the Court in *Koontz* relied on its prior analysis of the facial challenges in *Memorial Hospital*, *Regan*, and *Rumsfeld* when it applied the unconstitutional conditions doctrine to land-use permits. *See* 133 S. Ct. at 2594. It is no answer, then, that real property is somehow unique in the unconstitutional conditions universe.

In any event, this case does not require the Court to decide whether *Nollan* and *Dolan* can be applied in a facial challenge. Petitioners' claim before the Court is an as-applied challenge. *See* Pet. App. 7a, 10c. In fact, this case presents the ideal vehicle for deciding the question presented. The ordinance at issue is indistinguishable from those conditions this Court has subjected to heightened scrutiny. Just as in *Dolan*—where the locality conditioned a permit on the landowner dedicating his property to improving drainage in a nearby floodplain—there is no question that the ordinance's requirement that Petitioners either set aside property for low-income housing or pay

an in-lieu fee would constitute a taking if imposed outside the permitting context. *See Dolan*, 512 U.S. at 379-80; *Koontz*, 133 S. Ct. at 2598-99. But unlike the condition in *Dolan*, which applied to one landowner, the ordinance here cannot be challenged as an unconstitutional condition despite applying to every landowner and developer in West Hollywood.

The Court of Appeal's decision also creates significant line-drawing problems. There is often little to distinguish between a condition that is legislatively imposed and one that is the result of an *ad hoc* permitting decision. While West Hollywood's ordinance is clearly a legislatively imposed mandate, "the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction." Reznik, *supra*, at 266. This has led some to conclude that "a workable distinction can[not] always be drawn between actions denominated adjudicative and legislative." *Town of Flower Mound*, 135 S.W.3d at 641.

Many courts thus refuse to apply the unconstituitonal conditions doctrine to legislatively imposed conditions not because there is any logical distinction, but simply because of their belief that this Court has never applied the doctrine outside the *ad hoc* process. In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), for example, the Colorado Supreme Court concluded that *Nollan* and *Dolan* arose only in the context of an *ad hoc* permit application, *id.* at 695-96. But that distinction is a shallow gloss on this Court's decisions. The conditions in *Nollan*, *Dolan*, and *Koontz* each arose from an overarching

legislative regime and were thus arguably legislative conditions, which has led some courts to recognize the difficulty of distinguishing between legislative and *ad hoc* conditions. *See, e.g.*, *Town of Flower Mound*, 135 S.W.3d at 641 (explaining how the exactions in *Nollan* and *Dolan* were imposed pursuant to a legislative scheme). The absence of a bright line between legislative conditions and adjudicative conditions is an additional reason why they should not be treated differently.

II. The Deepening Split in States and Circuits Is Trending in the Wrong Direction.

For more than 20 years, there has been an acknowledged split among the states and circuits on whether legislatively imposed conditions are subject to the unconstitutional conditions doctrine. *See Parking Ass'n of Ga.,* 515 U.S. at 1117 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.) ("The lower courts are in conflict over whether [*Dolan*]'s test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature."). Unfortunately, this Court has revisited its jurisprudence in this context only once since 1995, *see Koontz*, 133 S. Ct. at 2586, but it did not then address the split presented here. In fact, the *Koontz* dissent lamented the lack of guidance on whether heightened scrutiny applies to legislatively imposed exactions. *See id.* at 2608 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.) ("Maybe today's majority accepts that distinction [between *ad hoc* and legislative conditions]; or then again, maybe not. At the least, the majority's refusal 'to say more' about the scope of its new rule now casts a cloud on every [permitting] decision by every local government."). A majority of the

Court's current Justices thus have acknowledeged the confusion sown by the lack of clarity in this area.

Perhaps the split of authority was not ripe for this Court's review in 1995. Other than the case that was on appeal, the dissent from denial of certiorari in *Parking Association of Georgia* highlighted only a single district court case that exempted legislative enactments. 515 U.S. at 1117 (citing *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994)). But the same cannot be said today; the split has deepened significantly since then. *See* Pet. 30-32. Justice Thomas was correct to note recently that the split of authority "shows no signs of abating." *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of cert.). And the majority of courts during this time period have followed the wrong path, choosing to exempt legislatively imposed conditions from heightened scrutiny. *See, e.g.*, *Alto Eldorado P'ship v. Cty. 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); *Spinnell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003), *abrogated on other grounds by Hageland Aviation Servs. Inc. v. Harms*, 210 P.3d 444, 450 n.21 (Alaska 2009); *San Remo*, 27 Cal. 4th at 670-71; *Krupp*, 19 P.3d at 696; *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 999-1000.

Most immediately, this Court's review is necessary to resolve a conflict within the country's most populous circuit. States in the Ninth Circuit conflict with that court's view on whether legislative conditions are subject to heightened scrutiny. California, Alaska, and Arizona have held they are not, *see San Remo*, 27 Cal. 4th at 670-71; *Spinnell Homes*, 78 P.3d at 702; *Home Builders Ass'n*

of Cent. Ariz., 930 P.2d at 996, while the Ninth Circuit has held that they are, *see Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (applying the unconstitutional conditions doctrine to a legislatively imposed condition); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (holding that, under circuit precedent, legislatively imposed conditions are subject to the unconstitutional conditions doctrine). As a result, the validity of a legislative condition in these states depends on the court in which that condition is challenged.

If this Court does not clarify this area of the law, then "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." *Cal. Bldg. Indus. Ass'n,* 136 S. Ct. at 929 (Thomas, J., concurring in denial of cert.). At best, landowners' Fifth Amendment rights will continue to depend entirely on the state in which they live. At worst, those rights depend on whether their cases arise in a state or federal court.

This Court has "grant[ed] certiorari in takings cases without the existence of a conflict." *Parking Ass'n of Ga.*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of cert.). "Where, as here, there *is* a conflict, the reasons for granting certiorari are all the more compelling." *Id.* (emphasis added).

CONCLUSION

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

Respectfully submitted,

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