No. _____

In the

Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,
Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Santa Monica enacted Ordinance 2191, which mandates that certain developers of new residential units sell or rent a percentage of those units at below-market prices or rents to lower-income persons as a condition to obtaining a building permit.

Does a Fifth Amendment takings claim, based upon the "essential nexus" and "rough proportionality" tests articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), lie against legislatively imposed exactions (like Ordinance 2191), as numerous state and federal courts have held? Or, are legislatively imposed exactions, including Ordinance 2191, immune to a takings claim under *Nollan* and *Dolan*, as the California Court of Appeal below and other courts have held?

CORPORATE DISCLOSURE STATEMENT

Action Apartment Association hereby states that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Action Apartment Association (Association) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The opinion of the court of appeal is published at 166 Cal. App. 4th 456, 82 Cal. Rptr. 3d 722 (2008), and is included in Appendix (App.) A. The opinion of the California Superior Court is not published and is included in Appendix B. The opinion of the court of appeal denying the Association's Petition for Rehearing is not published and is included in Appendix C. The opinion of the California Supreme Court denying the Association's Petition for Review is not published and is included in Appendix D.

JURISDICTION

On August 28, 2008, the California Court of Appeal entered judgment affirming the dismissal of the Association's complaint. On December 10, 2008, the California Supreme Court denied the Association's Petition for Review. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

> [N]or shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The text of Santa Monica Municipal Code Chapter 9.56 and section 9.04.10.08.030 are reproduced in Appendix E and F, and the relevant portions of Santa Monica Municipal Code section 9.04.16.01.030 are reproduced in Appendix G.

INTRODUCTION

In this case, the California Court of Appeal held that where a regulatory taking is alleged, the constitutionally required principles of nexus and rough proportionality apply only to adjudicative exactions, *i.e.*, instances where, in an individualized, ad hoc setting, government offers a land use permit on condition that the permittee dedicate property or pay an in-lieu fee. In contrast, the decision permits a *legislature* to demand property or money from an entire class of landowners in exchange for land use permits, without having to demonstrate *any* nexus or proportionality between the alleged harmful effects of the proposed permitted activities and the property or money demanded by the legislature in return.

The court of appeal's application of the legislative-adjudicative distinction as a constitutional doctrine highlights a longstanding and continuing conflict among state and lower federal courts. Many courts have applied the heightened scrutiny of *Nollan v.*

California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to legislative exactions. *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 641 (Tex. 2004) (applying *Nollan* and *Dolan* in challenge to town code requirement that developer improve abutting streets regardless of development's impact); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beaver Creek*, 729 N.E.2d 349, 354-56 (Ohio 2000) (applying *Nollan* and *Dolan* in challenge to impact fee ordinance); *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (applying *Nollan* and *Dolan* in challenge to town ordinance requiring construction of fire pond and dedication of public easement over pond as condition to approval of subdivision). Other courts, including the court of appeal below, have declined to apply heightened scrutiny to legislative exactions. *See* App. A at 20-21. *See also San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 104-06 (Cal. 2002) (declining to apply *Nollan* and *Dolan* in challenge to housing replacement fees imposed by hotel conversion ordinance); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (declining to apply *Dolan* in challenge to legislatively imposed water resource development fee); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (declining to apply *Dolan* in challenge to legislatively adopted development impact "tax"); *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995) (declining to apply *Nollan* and *Dolan* in challenge to legislative imposition of costs of making changes to railroad tracks to accommodate drainage improvements). This entrenched conflict among many jurisdictions is a strong reason for this Court's review.

Whether *Nollan* and *Dolan* apply to legislative exactions is an issue of exceptional importance, and bolsters the need for this Court's review. Land use exactions are commonplace throughout the nation. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 203 (2006) ("Local government-imposed land development exactions have existed as long as localities have used zoning and subdivision regulation practices."). Both the regulated public and the regulators need to know the circumstances and conditions under which land use exactions may be imposed consistent with the Constitution's Takings Clause. Lower courts are thoroughly split on this issue. Clarification is desperately needed from this Court, not just to ensure the consistent application of the rule of law, but also—and especially—to protect the private property rights of those who seek development permits.

STATEMENT OF THE CASE

A. Ordinance 2191—Santa Monica's Affordable Housing Ordinance

On June 13, 2006, the City adopted Ordinance 2191, which amended Municipal Code sections 9.56.020, 9.56.040, 9.56.050, 9.56.060, and 9.56.070. *See generally* App. E. Ordinance 2191 modifies the options for meeting affordable housing requirements. The Ordinance is a species of inclusionary zoning regulation. "[S]uch programs either mandate or encourage developers of new residential projects to set aside a certain percentage of a project's residential units for lower and moderate-income households." Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 37 Urb. Law. 513, 514 (2005).

Ordinance 2191 follows this pattern. It mandates the onsite or offsite development of affordable housing units in conjunction with market-rate housing unit construction. App. E at 5-6 (Santa Monica Municipal Code § 9.56.040). Under the Ordinance, developers are required to transfer ownership of the required affordable unit or units to third persons for the benefit of the City's housing policies. *See generally id.* at 1 (Santa Monica Municipal Code § 9.56.010).

For on-site projects of between four and fifteen units, developers must dedicate 20% of the units for sale to moderate income households or for rent to low-income households. *Id.* at 6 (Santa Monica Municipal Code § 9.56.050(a)). For projects over fifteen units, the required dedication percentage is 25%. *Id.* at 6-7 (Santa Monica Municipal Code § 9.56.050(b)). Projects that will provide off-site affordable housing must dedicate 45% of the total units to affordable housing if the project is between four and fifteen units and 50% if the project is larger than fifteen units. *Id.* at 10 (Santa Monica Municipal Code § 9.56.060(a). Additionally, developers must also dedicate off-street, covered parking for the low-income units. *See* App. G (Santa Monica Municipal Code § 9.04.16.01.030(a)); *see also* App. F (Santa Monica Municipal Code § 9.04.10.08.030).

Subsequent to the filing of the Association's complaint and petition, the City amended Ordinance 2191 to include a waiver provision. A developer may avail itself of the waiver provision if, and only if, it establishes through "substantial evidence" that the required dedication would be unconstitutional as applied to it. App. E at 20-21 (Santa Monica Municipal Code § 9.56.170).

B. The Los Angeles Superior Court Grants the City's Demurrer and Dismisses the Case

On September 11, 2006, the Association filed a writ of mandate and complaint for declaratory and injunctive relief in the Superior Court for the County of Los Angeles. The complaint challenged the City's adoption of Ordinance 2191, advancing federal and state constitutional as well as state statutory causes of action.

On June 18, 2007, the superior court granted the City's demurrer and ordered the case dismissed. With respect to the Association's federal constitutional cause of action asserting that the heightened scrutiny of *Nollan* and *Dolan* should apply to Ordinance 2191, the superior court ruled that such scrutiny is inapplicable within the context of a facial challenge to generally applicable legislation. *See* App. B at 3-4. The court also concluded that dismissal was proper because the Ordinance's waiver provision—which allows a developer to obtain a waiver of the Ordinance if it can demonstrate that the waiver as applied is unconstitutional—allows the possibility of the Ordinance's constitutional application in at least some cases, thus foreclosing a facial challenge. *See id.* The court also dismissed the Association's remaining causes of action.[1]

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[1] The Association advanced four other causes of action under the federal and California constitutions, as well as under state statutory law. This Petition does not seek review of the lower courts' disposition of those other causes of action.

C. The California Court of Appeal Affirms the Dismissal

The court of appeal affirmed the trial court's dismissal. The court held that, because *Nollan* and *Dolan* apply exclusively to adjudicative decisions, Ordinance 2191—a legislative action—is not subject to the heightened scrutiny otherwise mandated by those cases. *See* App. A at 18-21. The court did not reach the issue of whether the Ordinance's waiver provision precludes a facial challenge.[2] *See id.* at 21. The court subsequently denied the Association's Petition for Rehearing. App. C. The California Supreme Court then denied the Association's Petition for Review. App. D.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE HEIGHTENED SCRUTINY OF *NOLLAN* AND *DOLAN* APPLIES TO LEGISLATIVE EXACTIONS

Since this Court decided *Dolan* in 1994, state and federal courts have reached conflicting conclusions as to when to apply heightened scrutiny to land use exactions. The debate has developed in part around the legislative-adjudicative distinction. As set forth below, the stark conflict among lower courts as to the relevance of that distinction, for purposes of applying

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[2] The court also affirmed the dismissal of the Association's remaining causes of action. *See* App. A at 24.

Nollan and *Dolan*, strongly supports this Court's review of the California Court of Appeal's decision.

A. Many Courts, Including Several State Courts of Last Resort, Have Applied *Nollan* and *Dolan* to Legislative Exactions

Three state supreme courts have applied *Nollan* and *Dolan* to legislative exactions. *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d at 641 (applying *Nollan* and *Dolan* in a challenge to a town code requirement that a developer improve abutting streets regardless of the development's impact); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beaver Creek*, 729 N.E.2d at 354-56 (applying *Nollan* and *Dolan* in a challenge to impact fee ordinance); *Curtis v. Town of S. Thomaston*, 708 A.2d at 660 (applying *Nollan* and *Dolan* in a challenge to a town ordinance requiring construction of a fire pond and dedication of a public easement over the pond as a condition to approval of a subdivision). Many other courts have also applied *Nollan* and *Dolan* to legislative exactions. *See, e.g., Amoco Oil Co. v. Village of Schaumberg*, 661 N.E.2d 380, 389-91 (Ill. App. Ct. 1995), *review denied*, 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996) (applying *Nollan* and *Dolan* to a "purely legislative" requirement that twenty percent of a special use permit applicant's property be dedicated to the public); *Nat'l Ass'n of Home Builders of United States v. Chesterfield County*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995) (applying *Nollan* and *Dolan* in a challenge to a legislatively adopted cash proffer policy for residential rezoning applications), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (per curiam), *cert. denied*, 519 U.S. 1056 (1997). *Cf. Art Piculell Group v.*

Clackamas County, 922 P.2d 1227, 1235 n.6 (Or. Ct. App. 1996) (observing that "the fact that a specific condition that, by its nature, is subject to the rough proportionality test is mandated by general local legislation does not alter the *Dolan* analysis in any way"). Of these cases, the Texas Supreme Court's decision in *Town of Flower Mound* best illustrates the argument that *Nollan* and *Dolan* apply to legislative exactions.

In *Town of Flower Mound*, the Texas Supreme Court considered a developer's challenge to a requirement of the town's development code. The code mandated that, as a condition to obtaining permitting approval for a new residential subdivision, the developer must improve abutting streets, regardless of the development's impact on those streets. *See* 135 S.W.3d at 622-23. The town argued that *Nollan* and *Dolan* apply only to "exaction[s] . . . imposed on an ad hoc, individualized basis." *Id.* at 640. The court rejected the town's attempt to limit *Nollan* and *Dolan* to " 'adjudicative' decisions." *See id.* The court observed that the risk of extortionate behavior can be just as great with legislatively imposed exactions as with exactions determined in an adjudicative and individualized setting, and expressed doubt as to whether the distinction between legislative and adjudicative exactions is workable. *Id.* at 641. Concluding that heightened scrutiny should be applied to the legislative exaction at issue, *see id.* at 642, the court went on to hold that the exaction constituted a compensable taking, *id.* at 645.

B. On the Contrary, Many Courts, including the Supreme Courts of California, Arizona, Maryland, and North Dakota, as Well as the Ninth Circuit Court of Appeals, Have Held That *Nollan* and *Dolan* Apply Only to Adjudicative Exactions

Four state supreme courts have held that heightened scrutiny should not apply to legislative exactions. *See San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d at 104-06 (declining to apply *Nollan* and *Dolan* in a challenge to housing replacement fees imposed by a hotel conversion ordinance); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d at 1000 (declining to apply *Dolan* in a challenge to a legislatively imposed water resource development fee); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d at 724 (declining to apply *Dolan* in a challenge to a legislatively adopted development impact "tax"); *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d at 896 (declining to apply *Nollan* and *Dolan* in a challenge to legislative imposition of costs of making changes to railroad tracks to accommodate drainage improvements). Recently, the Ninth Circuit Court of Appeals joined them. *See McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008), *pet'n for cert. pending* (declining to apply *Nollan* and *Dolan* in a challenge to ordinance requiring replacement of storm water pipe in exchange for building permit). Of these cases, the California Supreme Court's decision in *San Remo* offers the most developed argument that *Nollan* and *Dolan* should not apply to legislative exactions.

In *San Remo*, a hotel owner wished to convert certain rooms within the hotel, which San Francisco had designated as "residential," to rooms available for transient, tourist use. *See* 41 P.3d at 95. Under the city's hotel conversion ordinance, the hotel owner was required to mitigate for the loss of residential housing. The hotel owner subsequently challenged the legislatively imposed mitigation—a $567,000 in-lieu fee—as a violation of the constitutional mandates of nexus and rough proportionality. The California Supreme Court, in rejecting the hotel owner's takings claim, held that *Nollan* and *Dolan* did not apply to fees imposed under the city's hotel conversion ordinance. The court reasoned that the fee was nondiscretionary, *id.* at 104, that it was imposed by "generally applicable legislation," *id.*, and that the exaction could not fairly be characterized as "an individualized development fee[]," *id.* at 105 (internal quotation marks omitted). One of the central reasons supporting the court's analysis was its conclusion that constitutional abuses in local land use permitting can be prevented without the need for close judicial scrutiny. Specifically, the court asserted that legislatively imposed exactions that might otherwise be constitutionally problematic can be controlled by "the ordinary restraints of the democratic political process." *Id.* The court went on to uphold the exaction's constitutionality. *See id.* at 111.

C. The Conflict Among Lower Courts as to When *Nollan* and *Dolan* Should Apply Is Critically Important and Deserves Resolution by This Court

The conflict in Fifth Amendment doctrine demonstrated by these cases has real-life consequences for millions of American property owners, particularly

those in the West, where neither the California state courts nor the Ninth Circuit Court of Appeals recognizes the constitutional requirement of a nexus and rough proportionality for exactions legislatively imposed as a condition for a building permit. Development exactions are commonplace. *See* Rosenberg, *supra*, at 203. *See also* David L. Callies, *Paying for Growth & Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 Urb. Law. 221, 231-32 (1991). With judicial approval, as in this case, enterprising localities unfairly enact laws to obtain land or money from developers to benefit society as a whole—an approach long ago disapproved in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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."). *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 404-05 (2002) ("Today's democratic legislative process is entirely conducive to forcing a landowning minority to shoulder an unfair portion of a general public burdens, in accordance with the will of a non-landowning majority."). As this Court recognized in *Nollan*, without constitutional checks, exactions can easily become "out-and-out plan[s] of extortion." 483 U.S. at 837.

The harm to the constitutional rights of permit applicants will be significant if this Court refuses to

review the legislative-adjudicative distinction and its relevance to *Nollan* and *Dolan*. Over four hundred local governments across the nation have some form of inclusionary zoning program, whereby development permits are conditioned on the dedication of affordable housing units.[3] Under inclusionary zoning regimes, local governments force developers to swallow the costs of providing below-market housing. *See* Tom Means, *et al., Below-Market Housing Mandates as Takings: Measuring Their Impact*, Ind. Pol'y Rep. at 7 (Nov. 2007). In these pressing economic times, the fact that inclusionary zoning programs and other forms of exactions can have the effect of increasing housing costs makes review of the legislative-adjudicative distinction all the more important. *See, e.g.*, Benjamin Powell & Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?*, Reason Public Policy Institute Policy Study 318, at v (Apr. 2004), *available at* http://www.reason.org/ps318.pdf (last visited Mar. 4, 2009) ("Inclusionary zoning has failed to produce a significant number of affordable homes . . . . By restricting the supply of new homes and driving up the price of both newly constructed market-rate homes and the existing stock of homes, inclusionary zoning makes housing less affordable."); Center for Housing Policy, *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the*

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[3] Timothy S. Hollister, *et al.*, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances* 49 (Jun. 2007), *available at* http://www.shipmangoodwin.com/files/Publication/6b1bce66-ef21-43eb-8e40-0134792cd8f2/Presentation/PublicationAttachment/176980f4-0626-44e2-b3fa-09029bd18878/national_survey_statutory_authority.pdf (last visited Mar. 4, 2009).

San Francisco, Washington, D.C., and Suburban Boston Areas 11 (Mar. 2008), *available at* http://www.nhc.org/pdf/pub_chp_iz_brief08.pdf (last visited Mar. 4, 2009) ("[R]esearch suggests that these [local development] regulatory barriers are driving up housing prices by constraining the ability of the market to respond effectively to demand.").

Lower courts' reliance upon "the ordinary restraints of the democratic political process" do not adequately protect individuals' constitutional rights, given that "legislative land use decisions made at the local level may reflect classic majoritarian oppression." Inna Reznick, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 271 (2000). Extortion through the permitting process is "just as likely to occur in legislative decisionmaking processes as in adjudicative settings." *Id.* at 247. The legislative-adjudicative distinction often produces perverse incentives for land use authorities, in that "[t]he more property and owners affected, the *less* likely courts will apply meaningful scrutiny to that decision." Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 515 (2006). Indeed, Justice Thomas has observed that the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

Moreover, the legislative-adjudicative distinction is irreconcilable with this Court's categorization, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), of

Nollan and *Dolan* as specific applications of the unconstitutional conditions doctrine.[4] *Id.* at 547 ("[T]hese cases involve a special application of the doctrine of unconstitutional conditions . . . .") (internal quotation marks omitted). Under the unconstitutional conditions doctrine, it does not matter who (the Legislature or an administrative agency) demands the condition; rather, what matters is whether the condition amounts to the sacrifice of a constitutionally protected right in order to receive something of value from the government. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) (discussing commentators' explanations of the doctrine, none of which turns upon the type of governmental body imposing the condition). *See also* Breemer, *supra*, at 402 ("[T]o the extent that *Nollan* and *Dolan* flow from the unconstitutional conditions doctrine, courts should not limit the essential nexus test to administrative exactions because no distinction between legislative and administrative conditions exists in unconstitutional

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[4] The scholarly commentary supports the characterization. *See, e.g.*, David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. Marshall L. Rev. 539, 559-62 (2007) (arguing that *Nollan* and *Dolan* are special applications of the unconstitutional conditions doctrine); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. Rev. 725, 756-57 (2007) (setting forth an unconstitutional conditions argument against monetary exactions); Jane C. Needleman, Note, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1576 (2006) (arguing that application of *Nollan* and *Dolan* should be triggered when a municipality attempts to achieve indirectly what it would be forbidden to achieve directly).

conditions cases involving other constitutional provisions.").

The lower courts are in sharp disagreement over when to apply the heightened scrutiny of *Nollan* and *Dolan*. Resolution of that disagreement will serve the interests of property owners and governments alike by providing certainty and clarity. Failure to resolve the conflict among the lower courts will not just lead to more confusion, it will also, de facto, sanction local governments' extortionate practices in administering land use permitting programs.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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