No. 16-1137

# In The
# Supreme Court of the United States

616 CROFT AVENUE, LLC, et al.,

*Petitioners,*

v.

CITY OF WEST HOLLYWOOD, CALIFORNIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District**

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, Southeastern Legal Foundation (SLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of 616 Croft Avenue, LLC, et al., Petitioners. Petitioners have consented to the filing of this *amicus curiae* brief. City of West Hollywood, California, Respondent, has withheld consent to the filing of this *amicus curiae* brief. Accordingly, this motion for leave to file is necessary.

SLF is a non-profit, public interest law firm and policy center founded in 1976 and organized under the laws of the State of Georgia. SLF is dedicated to bringing before the courts issues vital to the preservation of private property rights, individual liberties, limited government, and the free enterprise system.

SLF regularly appears as *amicus curiae* before this and other federal courts to defend the United States Constitution and the protection of private property interests from unconstitutional takings. *See, e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

SLF agrees with Petitioners that the California Court of Appeal's decision warrants review because the court ignored this Court's well-established precedent

as set forth in *Nollan v. California Coastal Commission*, 483 U.S. 285 (1987); *Dolan*, 512 U.S. 375; and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), and refused to apply the unconstitutional conditions doctrine simply because the City of West Hollywood imposed the permit condition at issue legislatively, rather than administratively. The California court is not the first to make this improper distinction and ignore this Court's takings jurisprudence. Rather, it is one of many contributing to an ever-deepening split of authority on this issue.

SLF believes that the arguments set forth in its brief will assist the Court in resolving the issues presented by the petition. SLF has no direct interest, financial or otherwise, in the outcome of the case. Because of its lack of a direct interest, SLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, SLF respectfully requests that this Court grant leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief in support of Petitioners, 616 Croft Avenue, LLC, et al.

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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## INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

For 40 years, SLF has advocated for the protection of private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs in support of property owners. *See, e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).



[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. Petitioners have consented to the filing of this brief in a letter on file with the Clerk of Court. Respondent withheld consent.

## SUMMARY OF ARGUMENT

A government may not require a person to give up a constitutional right in exchange for a discretionary government benefit. Referred to as the "unconstitutional conditions doctrine," this protects private property owners from being forced to surrender their Fifth Amendment right to just compensation in order to obtain a building permit, a variance, or other government benefit related to their property. Under the test set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 285 (1987), and *Dolan v. City of Tigard*, 512 U.S. 375 (1994), a "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

This Court applies the unconstitutional conditions doctrine to conditions imposed both legislatively and administratively. In fact, the conditions at issue in *Nollan*, *Dolan*, and *Koontz*, all of which this Court found unconstitutional, were all legislatively-imposed conditions. *See Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 377-78; *Koontz*, 133 S. Ct. at 2591-93. Ignoring this Court's precedent, a growing number of lower courts, including the lower court in this case, refuse to apply the heightened scrutiny mandated by *Nollan* and *Dolan* to legislatively-imposed conditions. As evidenced by this case where both the trial court and court of appeal readily acknowledged that the condition at issue

failed the *Nollan* and *Dolan* test, Pet. App. A at 9, the deepening split of authority allows the government to evade proper constitutional review, casts a cloud on governmental actions, and even worse, results in the unconstitutional taking of property without just compensation.

*Amicus* writes separately because the division among the lower courts "shows no signs of abating." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). The conflict among the lower courts leaves property owners and courts struggling to ascertain the level of scrutiny applicable to legislatively-imposed conditions and provides state and local governments with a roadmap for evading the Constitution.

Further, while the facts or legal issues in prior cases reaching this Court may have precluded resolution of the conflict and thus resulted in denial of certiorari, that is not so here. *See, e.g.*, *id.* at 929. Instead, this case provides the perfect opportunity for this Court to address the conflict – both of the lower courts already acknowledged that the permit condition demanding a well-settled property right, a right of first refusal, fails the *Nollan* and *Dolan* test. By granting certiorari, this Court can resolve the split and provide the resolution needed to protect and preserve those property rights guaranteed by the Fifth Amendment.

## ARGUMENT

### I. Introduction.

The Fifth Amendment to the United States Constitution prohibits the government from taking one's property without just compensation. U.S. Const., amend. V. Through a series of cases developed over the last three decades, this Court has made clear that the Fifth Amendment not only protects one from a physical taking, but also from governments that misuse the power of land-use regulations. *Koontz*, 133 S. Ct. at 2591; *see generally Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825. Known as the "unconstitutional conditions doctrine," it is well-settled that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385.

Through those cases, this Court laid out the test for determining whether a condition violates the unconstitutional conditions doctrine and thus, the Fifth Amendment. Under the *Nollan* and *Dolan* test, a "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591. In reaffirming the applicable test, this Court made clear that it applies "whether the government *approves* a permit on the condition that the applicant

turn over property or *denies* a permit because the applicant refuses to do so." *Id*. at 2595.

Here, as in *Nollan*, *Dolan*, and *Koontz*, the "condition" imposed by the government comes in the form of a dedication of property, the in-lieu fee, for a public use. And, as in *Nollan*, *Dolan*, and *Koontz*, the "condition" here is imposed through a legislative act. *See Nollan*, 483 U.S. at 828-30 (*state law* requiring dedication of beachfront property for a public access point as a condition to obtain a development permit); *Dolan*, 512 U.S. at 377-78 (*city land-use planning ordinance* requiring dedication of property for a bike path and greenway as a condition to obtain a permit); *Koontz*, 133 S. Ct. at 2591-93 (*state law* requiring an in-lieu fee as a condition to obtain a development permit for land designated as wetlands).

A property owner's constitutional right should not hinge on whether the government violates that right through a legislative act versus an administrative one. To be sure, the Court has always applied the unconstitutional conditions doctrine just the same when reviewing conditions imposed by statute. *See*, *e.g*., *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *United States v. Am. Library Ass'n, Inc*., 539 U.S. 194 (2003) (conditioning receipt of government funds on waiver of rights). Indeed, in the seminal unconstitutional conditions case, this Court struck down a California statute that unconstitutionally conditioned the

right of commercial carriers to operate on public highways. *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

Ignoring this Court's well-established precedent, the lower court here refused to apply the unconstitutional conditions doctrine simply because the City of West Hollywood imposed the permit condition legislatively, rather than administratively. The California court is not the first to make this improper distinction and ignore this Court's takings jurisprudence. Rather, it is one of many contributing to an ever-deepening split of authority on this issue.

## II. A deep split of authority exists regarding legislatively-imposed conditions and only this Court can provide the clarity needed to protect the constitutional right to just compensation.

A growing number of lower courts are dispensing with *Nollan* and *Dolan* simply because the condition at issue is imposed by a legislative act rather than through an administrative process. Despite the fact 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., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari), the

rejection of *Nollan* and *Dolan*'s heightened scrutiny creates several conflicts that warrant the attention of this Court.

The first and most obvious is the direct conflict with this Court's precedent set forth in *Nollan* and *Dolan*, and recently reaffirmed in *Koontz* – cases which all involved conditions imposed through a legislative act. The second is the conflict with this Court's precedent as it relates to the unconstitutional conditions doctrine generally, and the lack of support for distinguishing between legislative and adjudicative acts.[2] The third is the growing conflict among the lower courts, both state and federal.

### A. A growing number of lower courts improperly refuse to apply *Nollan* and *Dolan* simply because the condition at issue is imposed by a legislative act rather than through an adjudicatory process.

In 1995, just one year after this Court's opinion in *Dolan*, in a dissent from a denial of certiorari, Justice

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[2] This Court has consistently applied the unconstitutional conditions doctrine to both legislatively- and administratively-imposed conditions without regard to the condition's origin. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (applying doctrine to a legislatively-imposed condition without regard to its origin); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (same); *Perry v. Sindermann*, 408 U.S. 593 (1972) (applying doctrine to administratively-imposed condition without regard to its origin).

Thomas acknowledged that the lower courts were already "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." *Parking Ass'n of Ga.*, 515 U.S. at 1117. Within just a few months after *Dolan*, at least four lower courts disagreed as to its application, with two applying the nexus and rough proportionality test to legislative takings and two refusing to do so. *Compare Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (denying motion for reconsideration) (declining to apply *Dolan* because case involved legislative regulatory taking rather than an adjudicative one), *and Parking Ass'n of Ga. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994) (same), *with Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* even though challenged ordinance was a legislative enactment), *and Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994).

In *Trimen Development*, a developer challenged a local ordinance requiring developers to dedicate land for open space or pay a fee in lieu of the dedication as a condition to obtaining subdivision plat approval. 877 P.2d at 188. Less than one month after *Dolan*, the Supreme Court of Washington applied this Court's rule and found a rough proportionality between the dedication or in-lieu fee and the impact of the proposed development. *Id.* at 194.

One month later in *Manocherian*, the Court of Appeals of New York reviewed a property owner's challenge of a city ordinance that required property owners

to offer renewal leases to not-for-profit hospitals. 643 N.E.2d at 479. In doing so, the court applied *Nollan* and *Dolan*, explaining that through them, this Court "establish[ed] a constitutional minimum floor of protection which [it] lacks authority to diminish under the Supremacy Clause." *Id*. at 482. It continued, noting there is no evidence "for concluding that the Supreme Court decided to apply different takings tests" and that this Court's takings jurisprudence "suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases." *Id*. at 483.

Despite the "uniform, clear and reasonably definitive standard," a few months later, the District Court of Kansas expressly declined to apply *Dolan* because the condition at issue was legislative in nature rather than applied on an ad hoc administrative basis. *Harris*, 862 F. Supp. at 294. Shortly thereafter, the Supreme Court of Georgia followed suit and refused to apply the stricter scrutiny to a group's challenge of a city ordinance requiring owners of surface parking lots to dedicate portions of their property to create barrier curbs and landscaping areas. *Parking Ass'n of Ga*., 450 S.E.2d at 201. The court rejected the plaintiff's reliance on *Dolan*, opting instead to apply a significant detriment test. *Id*. at 203 n.3. Notably, Justice Sears, joined by Chief Justice Hunt and Justice Carley, wrote a strong dissent expressing their belief that the court erred in failing to follow this Court's takings jurisprudence as set forth in *Nollan* and *Dolan*. *Id*. at 203-04 (Sears, J., dissenting).

This almost immediate split of authority following *Dolan* provided state and local governments with a roadmap to evade constitutional scrutiny – impose conditions on one's constitutional right to just compensation through legislative enactments rather than through administrative procedures and avoid meaningful constitutional review. When property owners challenged legislatively-imposed exactions, governmental defendants could, from the beginning, convince the court to side with the District Court of Kansas and the Supreme Court of Georgia and apply a lower level of scrutiny.

### B. Unless this Court provides additional guidance on the applicability of *Nollan* and *Dolan* to legislatively-imposed conditions, the split will continue to deepen.

Over the last two decades, the split has deepened and local and state governments continue to evade the Constitution. For example, rejection of the *Nollan* and *Dolan* test in favor of application of an improper lower level of scrutiny simply because the government imposed the condition through legislation rather than administratively has contributed to lower courts finding the following conditions valid despite the lack of just compensation:

- Ordinances requiring dedication of affordable housing units. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 459 n.11 (2015); *Alto Eldorado P'ship v. City of Santa Fe*, 634 F.3d 1170, 1179

(10th Cir. 2011); *Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010);

- A county ordinance imposing an agricultural and open space easement on subdivision applicants. *See San Mateo Cty. Coastal Landowners' Ass'n v. Cty. of San Mateo*, 38 Cal. App. 4th 523, 546-49 (Cal. Ct. App. 1995);
- An ordinance imposing landscaping and street maintenance requirements as a condition to obtain a permit and/or certificate of occupancy. *Spinell Homes, Inc. v. Mun. of Anchorage*, 78 P.3d 692, 702 (Alaska 2003);
- A city ordinance conditioning permit approvals on requirements to pay impact fees. *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010);
- An ordinance requiring developers to pay a sanitation permit fee as a condition for development approval. *See Krupp v. Breckenridge Sanitation Dist*., 19 P.3d 687, 695-96 (Colo. 2001);
- A city ordinance imposing a water resources development fee on all new realty developments. *See Home Builders Ass'n of Cent. Ariz. v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997);
- A city ordinance requiring mobile home park owners who close their parks to pay displaced tenants. *See Arcadia Dev. Corp.*

*v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996);

- A city ordinance imposing a fee on hotel owners as a condition for a permit to reconfigure business to no longer provide rooms to long-term renters. *See San Remo Hotel L.P. v. City and Cty. of San Francisco*, 41 P.3d 87, 105 (Cal. 2002); and
- An ordinance requiring property owners to dedicate a significant portion of their property as a conservation area as a condition for a permit. *Common Sense All. v. Growth Mgmt. Hearings Bd.*, 189 Wash. App. 1026 (Wash. Ct. App. 2015), *cert. denied*, 137 S. Ct. 58 (2016).

Had those very conditions been administratively-imposed, those courts would have applied *Nollan* and *Dolan* scrutiny and many of those conditions would have, arguably, been invalidated.

The severity of the split of authority is readily apparent when one compares the aforementioned cases and conditions at issue with those that follow. Despite the similarities between the laws noted below and those listed above, the courts evaluating the following legislatively-imposed conditions all followed this Court's precedent and applied *Nollan* and *Dolan* scrutiny.

- A city ordinance requiring dedication of affordable housing units. *Commercial*

*Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991);[3]

- Ordinances conditioning permit approvals on requirements to pay impact fees. *See City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Home Builders Ass'n of Dayton and Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000);

- A town ordinance imposing road improvement requirements as a condition to obtain a development permit. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004);

- A town ordinance imposing an easement for fire prevention purposes as a condition for subdivision approval. *See Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998);

- State statutes and local ordinances imposing transportation impact fees on new developments. *See N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995);

- A city ordinance requiring property owners to pay a lump sum to displaced tenants as a condition for withdrawing rent-controlled property from the rental market. *Levin v. City and Cty. of San*

[3] The Ninth Circuit only applied *Nollan* to the affordable housing ordinance at issue in *Commercial Builders* because the case was decided several years before this Court heard *Dolan*.

*Francisco*, 71 F. Supp. 3d 1072, 1089 (N.D. Cal. 2014); and

- An ordinance requiring a cash proffer in exchange for a favorable action on rezoning applications. *Nat'l Ass'n of Home Builders v. Chesterfield Cty.*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995).

Not only has the split deepened, but as Justice Thomas noted just last year in his concurring opinion in support of the Court's denial of certiorari, the "division shows no signs of abating." *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928. For over two decades, "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." *Id*. And, while this Court has recognized that there is no "precise mathematical calculation," *Dolan*, 512 U.S. at 395, for determining when an adjustment of rights has reached the point when "fairness and justice," *id*. at 384, requires compensation, until this Court "decide[s] 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." *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 929. As Justice Kagan explained in *Koontz*, the split of authority "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

## III. The lower court's refusal to apply *Nollan* and *Dolan* to legislatively-imposed conditions undermines this Court's takings jurisprudence.

The deep and irreconcilable split of authority which cannot be resolved without this Court's clarification also significantly impacts the place of property rights in the constitutional hierarchy. The right to just compensation is part of the Fifth Amendment, which also provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;. . . .

U.S. Const., amend. V.

This Court has built strong protections around Fifth Amendment rights such as the prohibition against self-incrimination and double jeopardy. If the State of California were to claim that, because of budget constraints, it could no longer provide for grand jury indictments of those accused of environmental crimes, federal courts would be swift to announce that neither an admirable concern for the environment nor the realities of fiscal problems would justify deprivation of a basic right. The response would be similar to infringements on other rights, such as free speech or

the right to counsel, no matter how loudly the state proclaimed the desire to protect the environment.

Yet, the California court and a growing number of state courts and lower federal courts allow the government to deprive a man of his property in the name of public welfare simply because the government exercised its legislative power rather than its administrative power. This decision short-changes one of our basic personal liberties. Property rights are certainly as important as every other civil right, and should be treated as such.

In fact, property well may be considered the foundation for the other civil rights that we enjoy. John Locke, whose writings influenced the leaders of the American Revolution and the Framers of the Constitution more than any other single philosopher, described the preservation of property as "the end of government, and that for which men enter into society." John Locke, *Two Treatises of Government* § 138, at 213 (C. Baldwin, London 1824), *available at* https://archive.org/stream/twotreatisesgov00lockgoog#page/n218/mode/2up. Locke even went so far as to say, "lives, liberties, and estates, which I call by the general name, property." Locke, *Two Treatises of Government* § 123, at 204, *available at* https://archive.org/stream/twotreatisesgov00lockgoog#page/n210/mode/2up.

Locke's view found its way into both the English common law and the Enlightenment that generated our government. Private property and a free society

were "so intimately connected as to be all but equivalent." Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harv. J. L. & Pub. Pol. 165, 168 (1983).

This Court has recognized the interplay between property rights and other civil rights. "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Like other civil rights, property rights include the authority to dominion and use as one sees fit. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries, *2. Those rights of dominion, however, always have been limited by "the laws of the land," *id.*, to the extent that those laws are legitimate.

Government exercise of power in a representative government is legitimate only so long as it is compatible with the source of its authority – the individuals whom the government rules. As Locke expressed it, a legislature is "but the joint power of every member of

the society given up to that person or assembly." Locke, *Two Treatises of Government* § 135, at 209, *available at* https://archive.org/stream/twotreatisesgov00lockgoog#page/n214/mode/2up. Thus, a government has no more power than individuals can transfer to it.

Eminent domain is an exception to that general principle. When the government takes private property for public use, it is a forced transaction, pure and simple. It cannot be justified under any traditional powers of government. A person whose property is taken is rarely harming others; he is simply enjoying property that, because of location or other factors, the government happens to want. And, in those exceptional cases, such raw exercises of power are made palatable only by just compensation from the majority to the minority for the lost rights:

> The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation – this asserted paramount right – is exercised it shall be attended by compensation.

*United States v. Lynah*, 188 U.S. 445, 465 (1903).

Just as the government may not physically take one's property without just compensation, it also may not deny a benefit to a person because he exercises his

Fifth Amendment right to just compensation. "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." *Koontz*, 133 S. Ct. at 2596.

The test propounded by this Court in *Nollan* and *Dolan* and reaffirmed in *Koontz* protects those property rights guaranteed by the Fifth Amendment and provides for the free society Locke so insightfully wrote about. Ignoring this Court's jurisprudence, a growing number of lower courts refuse to apply a heightened level of scrutiny to legislative exactions. The refusal to apply *Nollan* and *Dolan* to legislatively-imposed exactions diminishes the Fifth Amendment and banishes property rights to the bottom of the constitutional hierarchy.

## CONCLUSION

For the foregoing reasons, and those stated by the Petitioners in the Petition for Writ of Certiorari, *amicus curiae* respectfully requests that this Court grant the writ of certiorari, and on review, reverse the decision of the California State Court of Appeal.

Respectfully submitted,

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